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1932.

THE

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AND IN

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AND ON APPEAL THEREFROM IN THE

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re BRITISH TRADE CORPORATION, LIMITED.

C. A.
1932
March 17.

[No. 00427 of 1931.]

Bill of Exchange—Same Drawer and Drawee—Right of Holder thereof to treat as Bill of Exchange or Promissory Note—Statute of Limitations—Presentation—Whether "in the body of it made payable at a particular place"—Address of Drawee—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 3, *sub-s.* 1; *s.* 5, *sub-s.* 2; *s.* 87, *sub-s.* 1.

On March 23, 1920, the branch of the British Trade Corporation, Ld., at Batoum, drew a document in the following form: "At sight pay this sole exchange to the order of Mr. B. L. Mailoff the sum of one thousand pounds sterling value received which place to account No. 2." The document was signed "For the British Trade Corporation" by the manager and accountant, and it was addressed at the foot "To the British Trade Corporation, 13 Austin Friars, London, E.C." By successive indorsements the plaintiff became the holder, and on December 20, 1923, his agents presented the document at the London offices of the Corporation. Payment was refused, as it was required that the indorsements should have a banker's certification. On November 23, 1926, a special resolution was passed for the voluntary winding up of the Corporation in connection with an amalgamation with the Anglo-Austrian Bank, Ld. On April 6, 1931, the plaintiff sought to prove in the winding up for 1000*l.* in respect of the document, but the liquidator rejected the proof on the ground that it was barred by the Statute of Limitations, as more than six years had elapsed since the date of the document before the winding-up resolution.

Under the Bills of Exchange Act, 1882, s. 5, sub-s. 2: "Where in a bill drawer and drawee are the same person . . . . the holder may treat the

C. A.

1932

BRITISH TRADE CORPORATION, *In re.*

instrument, at his option, either as a bill of exchange or as a promissory note." Sect. 87, sub-s. 1, provides: "Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable." The holder took out a summons claiming to have his proof admitted and he elected to treat the document as a promissory note:—

Held (reversing the decision of Eve J.), that the document when treated as a promissory note did not need to be presented for payment in order to render the maker liable, because, in order that a place of payment should be specified "in the body" of the note within s. 87, sub-s. 1, it must be embodied in the actual terms of the contract for payment. Time therefore began to run under the Statute of Limitations (21 Jac. 1, c. 16) as from the date of the document, and it was barred before the date of the winding-up resolution.

Sanderson v. *Bowes* (1811) 14 East, 500; *Price* v. *Mitchell* (1815) 4 Camp. 200; *Exon* v. *Russell* (1816) 4 M. & S. 505 applied.

APPEAL from Eve J.

On March 23, 1920, the branch of the British Trade Corporation, Ld., at Batoum, drew in favour of B. L. Mailoff a document in the following form:—

"At sight pay this sole exchange to the order of Mr. B. L. Mailoff the sum of one thousand pounds sterling value received which place to account No. 2.

To For the British Trade Corporation.

The British Trade Corporation,

13 Austin Friars, [Signed by the

London, E.C. manager and accountant.]"

This bill or note was successively indorsed over to the order of N. G. Israelianz, Marie Jaguianossoff, and the plaintiff Grigori Korganoff.

On December 20, 1923, agents for the plaintiff, who was in Russia, presented the bill or note at the London office of the British Trade Corporation, Ld., but payment was refused on the ground that "all endorsements require banker's certification and indemnity required for mutilation," and these words were written across the top of the document.

On November 23, 1926, a special resolution was passed for the voluntary winding up of the Corporation in connection with an amalgamation with the Anglo-Austrian Bank, Ld.

On April 6, 1931, the plaintiff put in a proof in the winding up in respect of the bill or note, but the liquidator refused to admit it on the ground that it was barred by the Statute of Limitations. On June 2, 1931, the plaintiff took out a summons in the winding up asking that the decision of the liquidator should be reversed and the proof be allowed in full.

Eve J. said that the document, on the face of it, would appear to be a bill of exchange, and being payable at sight, which was equivalent to "on demand," the remedy was prima facie barred when the winding up commenced. But, on behalf of the holder, it was said that the document was not what it first appeared to be—namely, a bill of exchange—but was a promissory note. This was so by virtue of s. 5, sub-s. 2, of the Bills of Exchange Act, 1882, which provided: "Where in a bill drawer and drawee are the same person . . . . the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note." It was not disputed that this document did disclose the drawer and drawee as being the same person. So long therefore as the holder had done nothing to evidence an election, it was open to him at any stage to make his election; and he now claimed to treat it not as a bill but as a promissory note. The question then arose whether he was under any obligation to present it. Mr. Hunt said that the holder could avail himself of s. 87, so that the cause of action arose only when the note was presented and dishonoured. But, on behalf of the liquidator, it was said that, assuming it to be open to the holder to treat the document as a promissory note, the money was still payable on demand, because s. 87 only applied in the case of a promissory note which was "in the body of it made payable at a particular place." It was quite clear that the maker of the bill or note intended to treat the British Trade Corporation as the person to whom it was addressed, and it might be concluded that it was to be payable in England, because it referred to the sum of 1000*l.* sterling value received. He (his Lordship) thought there was no justification for treating the name and address of the drawer as a mere memorandum indorsed in the margin or in the corner of the document

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and not indicative of the necessity of presenting it for payment. In his opinion the document was a promissory note payable at a particular place within s. 87, and it followed that the Statute of Limitations did not afford any sufficient answer to the claim. He therefore made an order that the applicant was entitled to have his proof adjudicated on upon the basis that his claim was not barred by any Statute of Limitations.

The liquidator appealed.

W. A. Greene K.C. and *Harold Murphy* for the appellant. The holder has claimed to exercise the option conferred by s. 5, sub-s. 2, of the Bills of Exchange Act, 1882, and to treat the document in question as a promissory note. By s. 10 a bill payable at sight is payable on demand. In the case of a bill payable on demand, presentation for payment is generally speaking not necessary to make the acceptor liable, but it is to make the drawer or indorser liable: ss. 45 and 52. The drawer of a promissory note is in the position of the acceptor, and presentment is not necessary to make him liable unless the note "is in the body of it made payable at a particular place": s. 87, sub-s. 1. A promissory note is defined in s. 83, sub-s. 1, and in form this document does not satisfy that definition. It is in form a bill, but being addressed to the same person the option arises under s. 5, sub-s. 2, to treat it either as a bill or a note.

On the assumption that the holder has elected to treat it as a promissory note, the first question is whether this note "is in the body of it made payable at a particular place" so as to require presentment under s. 87, sub-s. 1. That depends on whether the address of the British Trade Corporation in London is in the body of the note. It is clear that if no presentment was necessary time began to run under the Statute of Limitations (21 Jac. 1, c. 16) from the date of the document, with the result that it would be statute barred before the beginning of the liquidation, just as it would if it were a bill: *Norton* v. *Ellam*. (1) Regarding the document

(1) (1837) 2 M. & W. 461.

as a promissory note, the drawer has not made payment at 13 Austin Friars a term of his promise to pay, and that is the test whether the note "is in the body of it made payable at a particular place": Bayley on Bills of Exchange, 5th ed., p. 30; *Sanderson* v. *Bowes* (1); it is not when the place of payment is indicated by way of memorandum: *Price* v. *Mitchell* (2); *Exon* v. *Russell* (3); *Williams* v. *Waring* (4); and *Masters* v. *Baretto.* (5) So, too, in *Stevenson* v. *Brown* (6) an indorsement providing for payment at a particular place was held not to be in the body of the document.

Secondly, it is contended that the option given by s. 87, sub-s. 1, cannot affect the operation of the Statute of Limitations. A cause of action arose on the document being signed, because, treating it as a bill, no presentation was necessary to make the acceptor liable. Time having commenced to run it must continue to run, and the exercise of the option ex post facto cannot affect this. There is no authority directly on the point, but in principle it is contended that this must be so: compare *Whitehead* v. *Walker* (7) where, time having commenced to run from the dishonour of a bill by non-acceptance, it was held that if the bill was presented for payment and again dishonoured no fresh cause of action arose.

Lastly it is suggested that the document was at first treated as a bill, so that no power existed later to elect to treat it as a note. Thus when the document was presented by Lloyds Bank it was stamped 2*d.*, the proper stamp for a bill of exchange payable on demand but not for a promissory note, which needs an ad valorem stamp: see Chalmers' Bills of Exchange, 8th ed., p. 403.

Wilfrid Hunt for the respondent. By s. 3, sub-s. 1, of the Act of 1882 a bill of exchange is "an unconditional order in writing, addressed by one person to another." Therefore it cannot be said that the document here was prima facie a bill of exchange. The effect of s. 5, sub-s. 2, is therefore,

(1) 14 East, 500.
(2) 4 Camp. 200.
(3) 4 M. & S. 505.
(4) (1829) 10 B. & C. 2.
(5) (1849) 8 C. B. 433.
(6) (1902) 18 Times L. R. 268.
(7) (1842) 9 M. & W. 506, 514.

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that when addressed by one person to himself it is prima facie a promissory note and the option given is to treat it as a bill of exchange. That option is only given to the holder and not to the drawer.

[GREER L.J. The document does not come within the definition of a promissory note. The option therefore is to treat it as a bill or a promissory note.]

In form the document is a direction by the drawer to himself to pay the amount, and that is in effect a promise to pay within s. 83, sub-s. 1. Further, it is a direction to the British Trade Corporation in England to pay in London and debit a particular account. It is only because this is a direction to the same person to pay that it can be treated as a promissory note. That direction must therefore be in the body of the note and the address with it.

The fact that the direction is to pay in sterling assists the view that payment was to be in London, and if so, at 13 Austin Friars. In *Williams* v. *Waring* (1) the address was in a corner and therefore not in the body of the note. A very similar document was considered in *Miller* v. *Thomson*. (2)

[LORD HANWORTH M.R. There the question whether there was in the body of the document a place for payment does not seem to have been discussed.]

It is necessary to consider what the contract is, and here it takes the form of a direction that the London office at 13 Austin Friars shall make payment. That amounts to a promise to pay at the London office. For these reasons time only began to run from the date of presentation, and the claim is not barred.

Again the answer to the second point taken on behalf of the appellant is that this is primarily a promissory note, and it was therefore open to the respondent to continue to treat it as a promissory note. The question as to stamp was not taken in the Court below. There is no evidence that any right of election was being exercised when the stamp was put on by Lloyds Bank as agents for collection.

[No reply was called for.]

(1) 10 B. & C. 2. (2) (1841) 3 M. & G. 576.

LORD HANWORTH M.R. This appeal raises an interesting point, and the facts can be quite shortly stated. On November 23, 1926, the British Trade Corporation, Ld., went into voluntary liquidation for the purpose of amalgamation with another company, that date being the date upon which the special resolution was confirmed. On April 6, 1931, at a time when the liquidation had not been concluded, a claim was made on behalf of the present respondent for the payment in the liquidation of 1000*l.* due upon a note. The claim made is that the note was a promissory note payable at sight, but that presentation for payment was necessary, and it was presented for payment on December 20, 1923, with the consequence that at the date of the commencement of the liquidation, the relevant date for this purpose, time had not run so as to bar the claim under the Statute of Limitations. The note was presented by the applicant as the holder for value of the promissory note.

The point that arises is this. The document is dated March 23, 1920. It is payable at sight and, by s. 10 of the Bills of Exchange Act, 1882, a note payable at sight is equivalent to a note payable on demand. If then the right to payment arose on the date of the document the six years during which there would be a right for payment not barred by the Statute of Limitations would last down to March 23, 1926. The consequence is that it would have been barred at the time of the commencement of the liquidation unless the right to payment did not arise until after the document had been presented for payment—namely, on December 20, 1923. From that date down to the date of the commencement of the liquidation the full six years had not run.

The question that we have to determine, therefore, is: Was it necessary that this document should be presented for payment? On its face it appears to be more nearly a bill of exchange than a promissory note, and it is, perhaps, of interest to observe that when it was presented for payment the bank through whom it was presented, that is to say, Lloyds Bank, treated it as being a bill of exchange, and put upon it the stamp suitable for a bill of exchange payable

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on demand. But I will leave that point and go to the main proposition which has been put before us. It is on the face of it not a promissory note, for it does not appear to fulfil all the requirements of s. 83 of the Act. But whether it was a bill or a note, it is said that there was an option given by s. 5, sub-s. 2, of the Act to the holder to treat it as a bill or a note which he could exercise as he was best minded to do. Sect. 5, sub-s. 2, provides: "Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note." Without determining the question, let it be accepted that there was an option, and that the option was exercised by the holder of treating this document as a promissory note.

If that be so then we have to determine whether or not it was necessary to present it for payment. Sect. 87, sub-s. 1, is in these terms: "Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable." Eve J. has come to the conclusion, upon looking at the document, that its terms place the promissory note within the earlier portion of s. 87, sub-s. 1, and not in the later portion; in other words, he held that those terms did provide that payment was to be made at a particular place and that this requirement was in the body of the promissory note. He therefore held that the applicant's claim was not barred by the Statute of Limitations, and he reversed the decision of the liquidator, who had determined that the claim was barred.

The point, therefore, is quite a short one: Is it to be held that in the body of this document regarded as a promissory note it is made payable at a particular place? What is relied upon is that it is addressed to the British Trade Corporation, 13 Austin Friars, London, E.C., and it is said that those words are within the body of the document and, hence, that it fulfils the terms of the first part of s. 87,

sub-s. 1. That brings me to the question what is the meaning of "in the body of" the note. I am in agreement with the observation made by Greer L.J. in the course of the argument that "in the body of" the note must mean in the terms of the actual contract to pay which is contained in the note. You may have some additional matter or a memorandum added to the note. But if it is to be in the body of the note, it must be a part of the actual terms of the contract made by the maker of it.

We have had our attention called to a number of cases which were decided before the codifying statute was passed, and, as we all know, the Code was intended to embody the result of the cases which had been decided upon bills and upon notes. Turn now to the two or three cases which make plain the meaning of "in the body of" the note. In *Price* v. *Mitchell* (1), which was decided in 1815, Sir Vicary Gibbs decided that an addition in the corner or on a part of the note indicating a place for payment by the words, "at Messrs. Veres, Smart & Co., 77 Lombard Street, London," is no part of the contract but a mere memorandum, and he quotes the words from Bayley on Bills of Exchange, 3rd ed., p. 96: "If a note be made payable at a particular place, and that place be mentioned in the body of the note, presentment for payment must be made at that place: but where the place is mentioned in the margin, it does not appear that such presentment is necessary." It would seem that s. 87, sub-s. 1, was intended to carry out the statement referred to by the Lord Chief Justice. That case may be contrasted with *Sanderson* v. *Bowes* (2), which was decided in 1811. In that case there was a promissory note of the defendants promising to pay so much at their banking house at Workington, and it was held that a presentation for payment was necessary in order to give the holder a cause of action. This case shows that where a place for payment is embodied in the actual terms of the contract it is in the body of the note, and presentment for payment is required. The illustration which I have taken from *Price* v. *Mitchell* (1)

(1) 4 Camp. 200. (2) 14 East, 500.

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is confirmed by further cases such as *Exon* v. *Russell* (1), which was decided in 1816, and *Williams* v. *Waring* (2), which was decided in 1829. Those cases seem to show that early in the last century it had become plain to practitioners that in order that a place for payment should be in the body of the note it must in effect form part of the contract for payment; whereas, words in the corner, in the margin or in the form of a memorandum, were not in the body of the note. With those cases before us it is possible to interpret s. 87, sub-s. 1. We have had an interesting argument, and Mr. Hunt has said all that can be said in favour of the view that he presents; but it appears to us that this note did not in the body of it require payment to be made at a particular place. The result is that presentment for payment was not required, and in those circumstances time under the Statute of Limitations had run before the company's winding up commenced For those reasons we differ from Eve J., and the appeal must be allowed.

I would only add one word on a matter which appealed to Eve J.—namely, that the measurement of the amount of the note or bill was in sterling. I cannot find any assistance from that. It seems quite possible that the parties should draw a bill or make a note that was payable anywhere in sterling without necessarily giving any special characteristic to the document in which the amount is so described. For those reasons the appeal must be allowed with costs and the decision of the liquidator must be restored.

GREER L.J. I agree. I think the decision of the liquidator is right and the decision of the learned judge is wrong. I cannot help thinking that economy in the argument in the Court below with regard to the reference to the old cases has had something to do with the decision of the learned judge.

The question arises whether the period of limitation in respect of the debt created by the document dated March 23, 1920, had or had not run at the time of the liquidation. If this document is regarded as a bill of exchange, it seems

(1) 4 M. & S. 505. (2) 10 B. & C. 2.

that time would have run before the beginning of the winding up, because there is nothing in the form of the document to indicate that it was payable only at 13 Austin Friars, London, E.C. 2. If the document is regarded as a promissory note, then time has run unless the document can be interpreted as merely a promise to pay 1000*l.* at the British Trade Corporation offices, 13 Austin Friars, London, E.C. 2.

The document was evidently drawn by the British Trade Corporation representatives in Batoum in the form applicable to a bill of exchange, but unfortunately those who drew the bill do not seem to have had regard to the definition of a bill of exchange which is contained in the Bills of Exchange Act, 1882, s. 3 : " A bill of exchange is an unconditional order in writing, addressed by one person to another." I have very little doubt that those in Batoum thought their branch was one person, different from the head office, and that in addressing the document to the head office they were creating a bill of exchange, the form of the document being suited for a bill of exchange and not a promissory note. A promissory note is defined in s. 83 as an unconditional promise in writing made by one person to another and signed by the maker. This document is not in terms a promise by the British Trade Corporation to pay Mr. B. L. Mailoff. It is a request by the branch in Batoum to the head office to undertake a liability to Mr. B. L. Mailoff, and in my judgment, taking the document by itself and apart from the provisions of s. 5 of the Bills of Exchange Act, it would neither be a bill of exchange nor a promissory note. As a result of decisions which had been given previously, s. 5, sub-s. 2, of the Act provides as follows : [His Lordship read the sub-section.] I understand that to mean that, where the document is neither a bill of exchange nor a note, it may be treated by the holder as either a bill of exchange or a promissory note. That is what the authorities had decided and what was afterwards provided in the codifying statute.

Now, if the document is treated as a bill of exchange, it would seem that the period of the Statute of Limitations had expired at the time the liquidation began. But, if it be treated

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as a promissory note, it is argued—and the argument succeeded before the learned judge—that it has to be interpreted as a promissory note to pay the sum of 1000*l.* at the office of the British Trade Corporation in London. The first observation I have to make about that is that the words of the address at the bottom of the document, "To the British Trade Corporation, 13 Austin Friars, London, E.C.," were inserted for the purpose of treating this document as a bill of exchange, and that they have really no place in it if, instead of treating it as what it was intended to be—namely, a bill of exchange, it is treated as a promissory note. But assuming for the moment that that is wrong, and that these words are to have some effect given to them when we deal with the document as a promissory note, it seems to me that it has been decided that words in that position in a promissory note are not to be treated as if they were in the body of the note. That I take to be the result of the decisions in *Sanderson* v. *Bowes* (1); *Price* v. *Mitchell* (2); and *Exon* v. *Russell*. (3) That view was acted upon by Darling J. in *Stevenson* v. *Brown* (4), where the words which were alleged to be part of the terms were not written in the corner at the bottom of the document, but were written across the face of the document. I regard this case as decided by the old cases. It is said that in this case the address is not in the corner of the document. But I fail to see the importance of that distinction; the words are in a part of the document which it would not be wrong to describe as in the corner of the document, and in any event they are in a side note beside the signature to the document. I think those cases compel us to hold that in the present case, treating this as a promissory note, it cannot be said to have in its body a promise to pay at the office of the British Trade Corporation in London. That is decisive of the case.

But some reliance was placed in argument by the respondents on the case of *Miller* v. *Thomson* (5), and especially on the

(1) 14 East, 500.
(2) 4 Camp. 200.
(3) 4 M. & S. 505, 507.
(4) 18 Times L. R. 268.
(5) 3 M. & G. 576.

observation made by Maule J. in the course of his short judgment: "This is a bill drawn by the whole company, acting by their directors, upon the whole company. It is a promise made by one partner acting on behalf of the company, under the order of the directors, that the company shall pay. It is a promise made by the company, at Dorking, to pay in London. It is, therefore, in effect, a promissory note." It is to be observed that the only question there was whether that document could be declared on as a promissory note, and no question arose for decision whether it was payable in London or elsewhere. If that question had arisen I have very little doubt that the other cases to which our attention has been called would have been cited before the Court. Therefore I do not think that we ought to attach very much weight to that obiter observation of Maule J. For those reasons I think the appeal should succeed.

I find it unnecessary to decide the extremely interesting question which was raised by the second argument of Mr. Greene—namely, whether, when there are two alternative methods of putting into litigation the right to payment of a sum of money, the party who is entitled to the payment can say: "I select that view which will enable me to keep the debt alive for 40 or 50 years and then make a demand which would be necessary in order to create the obligation." That is a question of very considerable importance and great difficulty, upon which there is no authority, and on which I do not propose to express any opinion.

ROMER L.J. I have arrived at the same conclusion, and were it not for the fact that we are differing from the decision of Eve J. I should content myself by saying that I agree with what has fallen from the other members of the Court. But as it is, I will endeavour to state very shortly my reasons for so differing.

The document with which we have to deal here is, in my opinion, neither a bill of exchange nor a promissory note. It is not a bill of exchange, because it is not an unconditional order in writing addressed by one person to another within the meaning of s. 3 of the Bills of Exchange Act, 1882. It

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is not a promissory note within the meaning of s. 83, because it is not an unconditional promise made by one person to another to pay a sum of money. The document is intended to be a bill of exchange, and was not ever intended to be an unconditional promise to pay. That being so one has to have recourse to s. 5 of the Act. That section means, in my opinion, that where there is a document in the form of a bill of exchange, but which is not a bill of exchange for the reasons therein mentioned—that is to say, because the drawer and the intended drawee are the same person, or because the drawee is a fictitious person or a person incapable of contracting—the holder may, at his option, treat it as though it were a bill of exchange, that is, in a case like the present, as though the drawee were a separate person from the drawer, or he may treat it as being what it is not—namely, a promissory note. If he treats it as a promissory note, it means that he is entitled to treat it as an unconditional promise by the drawer to pay. If that is the case, the fact that when it is drawn up in the form of a bill of exchange it is addressed to somebody else who was intended to be the drawee appears to me a wholly immaterial circumstance. Take the case of a bill drawn against a fictitious drawee—a fictitious name with a real address. For the purpose of s. 5, if the holder treats it as a promissory note, he must treat it as containing an unconditional promise to pay by the drawer, which it is not. In other words, as it seems to me, the holder must treat it as an unconditional promise by the drawer and disregard altogether the fact that it is addressed to a drawee. I should have thought, therefore, that in a case like the present, the fact that it was addressed to the British Trade Corporation, 13 Austin Friars, can be disregarded, and the document treated as though those words were not there at all. In that case there is no place named at which the promissory note is payable. On the other hand, if the words can be treated as the place at which the promissory note is payable, for the reasons already mentioned by the Master of the Rolls and Greer L.J., I think it is impossible to say that they occur in the body of the note.

On the other question as to the Statute of Limitations, I do not think it is necessary to add anything to what has already been said.

Appeal allowed.

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Solicitors: *Freshfields, Leese & Munns; Sheard, Breach & Co.*

H. C. G.

In re BEALE'S SETTLEMENT TRUSTS.

HUGGINS *v.* BEALE.

MAUGHAM J. 1931 *Oct.* 22.

[1930. B. 3458.]

Trust—Trust for Sale—Settlement of Proceeds of Sale—Trust for Sale with Consent of Person with First Life Interest and of his Wife—Bankruptcy of Person with First Life Interest—Consent refused—Application to Court by Trustees for Sale to Order Sale—Power of Court to Order Sale—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 30—*Trustee Act*, 1925 (15 *Geo.* 5, *c.* 19), *s.* 57.

Where, in the case of a trust for sale, "any requisite consent cannot be obtained," because the person from whom it must be obtained refuses it, the Court, under s. 30 of the Law of Property Act, 1925, and s. 57 of the Trustee Act, 1925, can direct the trustees for sale to sell.

ORIGINATING SUMMONS.

Property had been conveyed by a deed of even date with a settlement of the proceeds of sale thereof to the trustees of the settlement upon trust, with the consent in writing of the person with the first life interest in the proceeds of sale and of his wife, to sell the same and to invest the proceeds of sale as in the settlement directed. The person with the first life interest was adjudged bankrupt, and his trustee in bankruptcy desired that the property, which was unoccupied and deteriorating, should be sold. The person with the first life interest would not consent to a sale, but the wife did consent: and by this summons, the trustees for sale asked (inter alia) that if, in the opinion of the Court, the property ought to be sold, an order might be made under s. 30 of the Law of Property

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Act, 1925 (1), and s. 57 of the Trustee Act, 1925 (2), directing them to execute the trust for sale, notwithstanding that the consent of the person with the first life interest could not be obtained.

Eardley-Wilmot for the summons.
J. V. Nesbitt for the person with the first life interest.
Winterbotham for the wife and an infant child.
Vanneck for the trustee in bankruptcy.

MAUGHAM J. In my opinion the Court has jurisdiction, under s. 30 of the Law of Property Act, 1925, and s. 57 of the Trustee Act, 1925, to direct a sale by trustees for sale where the necessary consent cannot be obtained by reason of the refusal of the person who is the one to give it. Accordingly, in the exercise of my discretion in the circumstances, I make the order asked for on the summons.

Solicitors: *Marson & Toulmin; Arthur C. Dowding; Wood, Nash, Hewett & Riddett, for James Eldridge & Sons, Newport, Isle of Wight; Wingfields, Halse & Trustram.*

(1) Sect. 30: "If the trustees for sale refuse to sell or to exercise any of the powers conferred by either of the last two sections, or any requisite consent cannot be obtained, any person interested may apply to the court for a vesting or other order for giving effect to the proposed transaction or for an order directing the trustees for sale to give effect thereto, and the court may make such order as it thinks fit."

(2) Sect. 57, sub-s. 1: "Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income."

Sub-s. 2: "The court may, from time to time, rescind or vary any order made under this section, or may make any new or further order."

Sub-s. 3: "An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust."

Sub-s. 4: "This section does not apply to trustees of a settlement for the purposes of the Settled Land Act, 1925."

K. R. A. H.

SHEFFIELD MASONIC HALL COMPANY, LIMITED *v.* SHEFFIELD CORPORATION.

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1932

March 7, 8, 9, 10.

[1931. S. 2782.]

Easement—Light—Ancient Lights on Different Sides of Building to Same Parts of Building—Right to Build on Land facing Ancient Lights—Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 3.

When a room in a building receives light through windows on different sides which are ancient lights, the owner of land on either side as a general rule can build only to such a height as, if a building of like height were erected on the other side, would not deprive the room of so much light as to cause a nuisance.

Colls v. *Home & Colonial Stores, Ld.* [1904] A. C. 179 considered.

Observations on the tests applied by experts to measure diminution of light.

WITNESS ACTION.

In this action the plaintiff company asked for an injunction to restrain the defendant Corporation from further erecting a certain building so as to cause a nuisance or illegal obstruction to the windows of four rooms in a building owned by the plaintiff company, or alternatively for damages. On a motion the plaintiff company did not press for an interim injunction, and at the trial an injunction was not sought and both parties asked the Court to assess the damages.

The plaintiff company was the owner in fee simple of the Masonic Hall, on the south side of, and fronting upon, Surrey Street, Sheffield, at the corner of Eyre Street. The Masonic Hall was about 39 feet high, its eastern part having been built in 1876 and the rest of it in 1887. The plaintiff company let it out to Freemasons for Masonic purposes, the average yearly receipts from the letting amounting to about 2200*l.* Surrey Street was about 40 feet wide. On its north side were the Central Lending Library, opposite the east end of the Masonic Hall, an open space about 64 feet wide and, opposite the west end of the Masonic Hall, the Central Reference Library. The Central Lending Library was about 40 feet high, save for its pediment, opposite Eyre Street, which was

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about 54 feet high, and the Central Reference Library was about 64 feet high. One of the four rooms was lighted by windows looking on to Surrey Street and by windows looking on to Eyre Street. This room was on the ground floor, and its measurements were 50 feet by 26 feet. It was much used as a luncheon room and dining room. At the date of this action all the windows of the room were ancient lights. On the opposite side of Eyre Street at the corner of Surrey Street was what was practically an open space with behind it a low building. From the east end of Surrey Street a great amount of light came over Eyre Street and passed to those windows of the room which faced Eyre Street. About the early part of 1931 the defendant Corporation began to build along the north side of Surrey Street an art gallery and library intended to be 65 feet high along its whole front, save that for 62 feet in the centre it was to be 70 feet high.

On July 3, 1931, the plaintiff company issued the writ in this action, and immediately afterwards gave notice of motion for an injunction. As already stated, the plaintiff company did not press for an interim injunction. Before the date of this action the Central Reference Library had been pulled down, and on the site of it and of the open space 64 feet wide the defendant Corporation had completed the framework of the art gallery and library.

When the action came on for trial, on March 7, 1932, his Lordship intimated that, as the plaintiff company had not sought an interim injunction, the Court, whatever its view might otherwise have been, would in the circumstances be exceedingly loth to grant an injunction at the trial. Accordingly an injunction was not sought, and counsel for both parties invited his Lordship, instead of granting an inquiry as to damages, to assess the damages on the materials before the Court.

The only point calling for report in the case is as to the extent to which different owners of land opposite windows of a room which are ancient lights are affected by the restrictions imposed by the easements acquired under the Prescription Act, 1832.

H. B. Vaisey K.C. and *Evelyn Riviere* for the plaintiff company. The fact that the windows facing Eyre Street are ancient lights and that the room is well lighted from them, does not give to the defendant Corporation the right to build the art gallery and library to its full height and so to deprive the windows facing Surrey Street of all light. Similarly, the owner of the land opposite the windows facing Eyre Street is not free so to build as to deprive those windows of all light, notwithstanding that the windows facing Surrey Street are ancient lights. Each owner may erect a building to such a height only as, with a building of the same height by the other owner, will leave the room sufficiently well lighted for ordinary purposes.

Fergus Morton K.C. and *A. Andrewes-Uthwatt* for the defendant Corporation. Where, as in the present case, there are two open spaces each facing ancient lights to the same parts of a building on different sides of that building, the doctrine in regard to the right to build on those open spaces is "first come, first served." The defendant Corporation is therefore entitled to build the art gallery and library to its full height.

Vaisey K.C. in reply. It is true that one logical result of the plaintiff company's contention is that if a room has ancient lights on four sides the right of each owner to build on the land facing the ancient lights is limited accordingly. But it is submitted that that contention is correct. It cannot be contended that the true doctrine in regard to the right to build is "first come, first served," for the meaning of the doctrine in such a case as the present is not clear. It may mean that if one owner begins to build before the other the other may not build at all, or that the other may build and that, if he is the first to complete his building, the owner who began first must cease to build. It is therefore submitted that the argument put forward on behalf of the defendant Corporation is unsound.

MAUGHAM J. [after stating the facts and examining the evidence:] The point which seems to me to arise in this

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case and which, so far as I know, is new, is as to the claim of the defendant Corporation that it may build as high as it will opposite the room, provided that the room receives from the east over Eyre Street a light sufficient for all the reasonable purposes of mankind. I will test that claim, which raises a question of some importance, by assuming for clarity that the Masonic Hall has two windows on the north and two windows on the east—I am deliberately taking two for the purpose which I have in mind. I shall assume that the windows to the north look over a close called Blackacre, and the windows to the east look over a close called Whiteacre; and for simplicity I shall assume that there is no building on either Blackacre or Whiteacre, and that each of them is an open space. The windows both to the north and to the east are, I will assume, ancient lights. The question that arises is this: Can the owner of Blackacre build as high as he pleases while Whiteacre remains an open space, or is there any limit to his right? It is to be observed that, if the owner of Blackacre chooses to build so as entirely to obstruct the north windows of the Masonic Hall while Whiteacre remains an open space, the owner of Whiteacre will probably not be able to build at all. Counsel for the defendant Corporation, in his clear argument on this point, said that the doctrine is "first come, first served." I think that he admitted that there would be a difficulty if the owner of Blackacre and the owner of Whiteacre were both to begin to build at once: and there would be a difficulty also if the owner of Blackacre having begun to build, the owner of Whiteacre put up a screen—it might be, of quite light construction—at the edge of his plot so as to obstruct the eastern windows of the Masonic Hall. Clearly the proposition put forward by counsel for the defendant Corporation leads to very great difficulty and, in my view, to great injustice; and I do not think that it is sound. The proper way to test the matter, in my opinion, is to consider the nature of the right obtained in such a case. The Prescription Act, 1832, provides by s. 3 a new method of obtaining an indefeasible right to light to and for a dwelling-house, workshop or other building, and where the section

is relied on there is, of course, no need for an implication of grant. (1) But the nature of the right acquired under the section is precisely the same as the nature of the right as acquired before the Act came into force. That has been laid down in a number of cases, and indeed is, in my view, the foundation of several of the speeches in the great case of *Colls* v. *Home & Colonial Stores, Ld.* (2) In that respect the views expressed in the case of *Kelk* v. *Pearson* (3) were followed, and for brevity I will refer only to one passage in the speech of Lord Halsbury L.C., who said (4): ". . . . singularly enough, there has been a complete uniformity of decision upon the construction of the statute that it has made no difference in the right conferred, but is only concerned with the mode of proof. . . . ."

The right conferred is undoubtedly a right analogous to the right conferred by Roman law of a servitude of the character which, I think, was described as ne facias. The dominant tenement is entitled to the benefit of a quasi-covenant by the owner of the servient tenement precluding him from building in the normal case in such a way as to obscure the plaintiff's rights to a degree which would interfere with his comfortable enjoyment of his premises, according to the habits and requirements of ordinary people, or, as the House of Lords or some members of that tribunal put it, would cause a nuisance to the plaintiff in the enjoyment of his premises.

In the case which I am considering, since the dominant tenement has windows both north and east and rights of light are acquired for those windows, the question arises what restriction is to be imposed by the quasi-covenants upon the

(1) Sect. 3: "And be it further enacted, that when the access and use of light to and for any dwelling house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

(2) [1904] A. C. 179.

(3) (1871) L. R. 6 Ch. 809.

(4) [1904] A. C. 179, 183.

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owners of Blackacre and Whiteacre as soon as the right is acquired under s. 3 of the Prescription Act, 1832 ? If counsel for the defendant Corporation is right, the obligation upon the owner of Blackacre, for instance, will be of this character, that he will not erect his building to such a height as will interfere with the northern windows of the Masonic Hall, and so that the extent of the restriction is to depend on whether at the time of the erection of the building the owner of Whiteacre has built upon or has preserved an open space on Whiteacre ; and similarly the owner of Whiteacre will be placed under an uncertain obligation with regard to building dependent upon the existence or the non-existence of buildings on Blackacre. To my mind, that is an impossible conclusion. It is true that the Court is dealing with a somewhat curious hypothesis as to the nature of the right in question ; but, after all, the nature of the right should be founded on the common sense of the matter, and I do not think that it is possible that these servitudes imposed as if by lost grants upon Blackacre and Whiteacre are servitudes the extent of which depends upon the actual condition of things existing on those respective premises at some future time. The alternative seems to me to be comparatively simple. At the moment when the right is acquired by the plaintiff company in respect of both of the two windows on the north and the two windows on the east, I think that the nature of the restrictive obligation imposed upon people facing those two windows is that they will not so build as by their joint action to cause a nuisance to the plaintiff company within the meaning of that term as used by the House of Lords in *Colls* v. *Home & Colonial Stores, Ld.* (1) ; in other words, I think that the proper view is that the owner of Blackacre can build to such a height as, with a similar building by the owner of Whiteacre, will yet leave sufficient light for the Masonic Hall. The obligations of both owners are the same ; neither has a greater obligation than the other in the simple case which I am considering. That seems to me to solve the problem with which I have to deal.

(1) [1904] A. C. 179.

I think it is a mistake to suppose that, having regard to the very large amount of light which is coming over Eyre Street to the eastern windows of the room, the defendant Corporation is entitled to build as high as it pleases on the other side of Surrey Street. I think that that proposition goes too far, and must be qualified so as to preserve the rights of the owners of the premises on the other side of Eyre Street to a reasonable utilization of their land; and I see no reason to suppose that at some not distant date the owners of those premises will not desire to erect a substantial building right up to the corner of the building line.

Now the result of that view is to qualify to some extent the evidence given on behalf of the defendant Corporation that a large part of the room will always be perfectly well lighted. It does not mean that the whole of its evidence goes, but I think that it does tend to qualify that evidence, and it leads me to the conclusion that I ought to accept the evidence on behalf of the plaintiff company that the room will be obscured to such an extent by the defendant Corporation's new building as to justify the view that, if the qualification that I have made with regard to the light coming from the east is taken into account, that room will not be left with enough light for the ordinary purposes of its user, either as at present for luncheons and dinners, or for the other purposes for which it may be used in the future.

There is one other thing which I think it my duty to say, and that is with reference to the value of expert evidence in cases of this kind. I do not desire to minimize the value of that evidence, or to intimate a doubt that the lines on which it has recently been given are far more useful to the Court than they used to be before Mr. Waldram, the expert witness for the defendant Corporation, and, I think, some other experts, devised a new method of measuring the amount of obscuration of light caused by a new building. But I do think I ought to say that, in my opinion, it is possible to exaggerate that evidence in a particular case. The question to be solved by the Court is not really a question which can always be fairly decided by the amount

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of direct sky which will reach a hypothetical table two feet nine inches high in a particular room. I think it is safer to rely upon the view expressed in *Colls* v. *Home & Colonial Stores, Ld.* (1), and to consider whether, as a matter of common sense, there is such a deprivation of light as to render the occupation of the house uncomfortable in accordance with the ordinary ideas of mankind. I think that the hypothetical table two feet nine inches high is a test which may not always be satisfactory. It gives, I think, too much importance to the height of the window above the floor. I had not long ago a case of a cottage with very low windows, in which I thought that the test was wholly unsound. I would add that I think Mr. Waldram was quite right in taking into account reflected light coming from floor, walls and ceiling, and I would add that in my opinion such reflected light as that may often be of great importance. Accordingly, I do not agree that the injury done may in all cases fairly be tested by considering only the amount of visible sky light to be perceived by an eye situate two feet nine inches high. It is manifest, among other things, that that will attribute the same result to a building ten feet away, cutting off, say, 50 per cent. of the light, as would be attributed to a building sixty feet away cutting off a similar number of degrees of light, and yet it is obvious to anybody who has ever considered the matter for five minutes that the effect as regards the occupation of a house and its comfort would be very much greater in the former case than in the latter. I will add, also, that to my mind it must be quite wrong to disregard reflected or diffused light coming to a room from outside as well as the effect of such light inside a room. The doctrine of *Dent* v. *Auction Mart Co.* (2), that reflected light offered or promised by the owner of the defendants' premises ought, for the reasons given by the learned judge in that case, to be disregarded, has nothing akin to the suggested proposition that, in considering whether there has been such a deprivation of light as to render the occupation of the house uncomfortable according to ordinary ideas, reflected

(1) [1904] A. C. 179. (2) (1866) L. R. 2 Eq. 238.

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or diffused light coming into the premises under the conditions that subsist is to be rejected, quite apart from the illegal act of the defendants. There are in my belief many rooms in ordinary buildings where the table test would give a wholly false view of the condition of things in the room. I may add that I have had cases before me which upon the evidence bear out that view.

[His Lordship then found, on the evidence, that the amount of damage suffered by the plaintiff company was 750*l.*, and gave judgment for the plaintiff company for that sum, with costs.]

Solicitors: *Indermaur & Brown, for Webster & Co., Sheffield; Sharpe, Pritchard & Co., for E. B. Gibson, Sheffield.*

K. R. A. H.

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In re ISABEL JOANNA JAMES.

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Charity—Devise and Bequest to Establish and Maintain Home of Rest—Persons to use Home—Valid Charitable Trust.

A testatrix devised a freehold house to her trustees in trust to establish a Home of Rest for the Sisters of a Community, for the Clergy of the Diocese of Truro, and such persons as the Mother Superior of the Community should nominate and appoint, and bequeathed 6000*l.*, the interest of which should be applied to repair the house and maintain and support the inmates. The Sisters of the Community were engaged on charitable work and their individual incomes were pooled. It was doubtful whether it was practicable to carry on the Home of Rest with the resources available:—

Held, that the devise and bequest were a good charitable trust; that the Sisters and the Clergy were good objects of a charity; that the Mother Superior should only appoint persons who were suitable objects of a charity, and to do otherwise would be a breach of trust; that there should be an inquiry in Chambers whether it would be practicable now or at any future time to establish the Home of Rest, and if so to settle a scheme; and that if it was found not practicable the question must be determined whether the trust failed or should be applied cy près.

In re Estlin (1903) 72 L. J. (Ch.) 687 followed.

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MRS. ISABEL JOANNA JAMES, widow, by her will dated August 30, 1928, appointed William Ernest Grenfell and John Panayoty Ballachey executors and trustees thereof, and, after making certain specific and pecuniary bequests and a specific devise, devised and bequeathed her freehold messuage or dwelling-house, lands, hereditaments and premises known as Glan Mor in the city of Truro, together with the furniture and effects therein as specified in the inventory mentioned, and the sum of 6000*l.* unto her trustees "In trust that my trustees shall establish a Home of Rest for the sisters of the Home of the Community of the Epiphany at Truro, the Clergy of the Diocese of Truro, and such persons as the Mother Superior for the time being of the said Home of the Community of the Epiphany at Truro shall from time to time nominate and appoint, in manner following (that is to say) in the first place that my Trustees shall with the sanction of the High Court or a Judge thereof or of the Charity Commissioners under section 8 of the Mortmain and Charitable Uses Act, 1891, retain the whole of the said premises as a Home of Rest to be called St. John's Home of Rest," directing that a certain inscription should be placed above the front door, "and shall invest the said sum of 6000*l.* in any investments authorised for Charitable Trust Funds with power to vary the investments thereof from time to time and shall out of the income arising from such investments keep the said Home of Rest in proper repair and insured against fire and shall apply the surplus of the said income towards the maintenance and support of the inmates thereof." The testatrix devised and bequeathed all the residue of her real and personal estate to her nephew, the said John Panayoty Ballachey.

The testatrix made a codicil to her will, which did not affect the devise and bequest, and died on October 16, 1930, and the will with the codicil thereto was duly proved in the Principal Probate Registry on January 10, 1931. The testatrix left an estate amply sufficient to provide the sum of 6000*l.*

Glan Mor is a large house in the city of Truro with gardens and fields adjoining containing 3,097 acres or thereabouts.

The Community of the Epiphany at Truro is a religious order, of which the members are ladies belonging to the Church of England, and the Home of the Community is situate on the outskirts of the city of Truro about a mile from Glan Mor. The members of the Community at present consist of forty-eight sisters of the first order, eight sisters of the second order, and five novices. The whole work done by the Community appears to be mainly charitable, and comprised among other work a laundry with a home, a convalescent home for working men, a mission house, and a branch house at Penzance, and the Community also takes charge of an industrial school in Truro, and of St. Saviour's Hospital, Regent's Park, in London, and has branch houses in Tokyo and Kobe in Japan. The Sisters have a common fund in which all of them who have any private income pool the same for the common good. The Mother Superior of the Community at present is Miss Edith Craigie Hamilton, and the Bishop of Truro is the visitor. The testatrix had taken much interest in the work of the Community and had assisted it in many ways.

The executors communicated to the Mother Superior and the Bishop of Truro the details of the devise and bequest, and they were of opinion that the Community would be unable to accept the devise and bequest, as the interest upon the 6000*l.* would not be nearly sufficient to repair and pay the rates on the house and maintain the Home of Rest if it were established, and the Community had no other funds available for the purpose. It was considered that a sum of at least 600*l.* a year would be required for the maintenance of the house and the inmates of such a Home of Rest.

In these circumstances the executors were advised to apply to the Court for a decision whether the devise and bequest were charitable, and if so in what manner the devise and bequest should be dealt with.

William Ernest Grenfell, therefore, as one of the executors, issued this summons asking for the decision of Court whether the devise and bequest created a valid and effective trust and whether, if there were such a trust and such trust could

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not be carried out, the house and legacy formed part of the residuary estate, or whether the trust should be carried out cy près, and that if necessary a scheme for the administration of the trust should be directed. The defendants to the summons were the Mother Superior, the Bishop of Truro, the said John Panayoty Ballachey, as the residuary legatee, and the Attorney-General.

Russell Gilbert for the plaintiff.

Wilfrid Hunt for the Mother Superior and the Bishop of Truro. My clients would gladly accept the benefits given by the will if it were practicable to carry them out, but the interest of the 6000*l.* would be quite insufficient for the purpose, and there are no other funds available. They submit however that a good charitable trust has been created. The objects of the trust are mainly the Sisters of the Community and the clergy of the Diocese of Truro. The Sisters are poor and doing charitable work, and the clergy of the Diocese are mainly poor men and their work is charitable. I submit that the devise and bequest should be applied cy près, and that a scheme should be settled by which the trust might be applied for the benefit of the Diocese of Truro if the original trust in the will cannot be carried out.

Stafford Crossman for the Attorney-General. Mr. Hunt's clients are not really proper parties to the summons. The real question is between the Attorney-General and the residuary legatee. On behalf of the Attorney-General I submit that this is a good charitable trust. The main object of the trust is to establish a Home of Rest, and that is a good charitable trust. The actual point was decided by Kekewich J. in *In re Estlin.* (1) In that case Kekewich J. held that a bequest for the establishment and maintenance of a Home of Rest for lady teachers was charitable, and the same principle will apply here. In *In re Roadley* (2) there was a trust to maintain a hospital and provide for the expenses and maintenance of the patients, and it was held to be charitable as being within the provision in the Statute of

(1) 72 L. J. (Ch.) 687. (2) [1930] 1 Ch. 524.

Elizabeth "for the relief of impotent and poor people." I do not suggest here any question of impotency or even of poverty, though it appears that the Sisters of the Community are under what is equivalent to vows of poverty, as all their means are pooled. If the Mother Superior were to admit to the Home persons who were not fit objects of a charity, that would be a breach of trust. A general gift for charitable purposes is not invalidated because some of the provisions are not strictly charitable. I refer to the observations of Lord Davey in *Hunter* v. *Attorney-General.* (1) The evidence that it is impracticable to carry out the trust is by no means conclusive. The legacy may be accumulated for some years till its value becomes sufficient for the interest to be applied as directed, and some contribution may be made by the persons requiring rest. A scheme should be prepared or an inquiry directed as to the practicability, and if not practicable the legacy should be applied cy près: *Wallis* v. *Solicitor-General for New Zealand.* (2)

G. D. Johnston (*Gover K.C.* with him) for the residuary legatee. To carry out the trust persons of all the three classes mentioned must be admitted, and it would be a breach of trust to use the Home for only one of the classes. In *In re Estlin* (3) the trust was for the benefit of lady teachers, and that would be an educational purpose and therefore charitable. Here the trust is for the benefit of the Sisters personally and not to promote the objects of the Community. I admit that the objects of the Community may be generally charitable, but there is no necessity that any individual Sister who may be admitted is doing charitable work. There is no direction as to the sort of "other persons" who are to be admitted to the Home by the Mother Superior. She might admit rich persons, who would pay for their stay and treat the place as a rest cure for nerves. In *In re Rees* (4) a bequest for missionary purposes was held not to be charitable, nor in *Dunne* v. *Byrne* (5) was a bequest to the

(1) [1899] A. C. 309, 324.
(2) [1903] A. C. 173.
(3) 72 L. J. (Ch.) 687.
(4) [1920] 2 Ch. 59.
(5) [1912] A. C. 407, 409.

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Archbishop of Brisbane for objects "most conducive to the good of religion" allowed to be charitable. In *In re Stratton* (1) a bequest to a vicar for such "parochial institutions or purposes" as he should select was held not charitable. I submit that even if they could be carried out this devise and bequest are not upon the terms of them charitable.

FARWELL J. [after reading the gift in the will continued:] The question is a familiar one, whether the gift is a charitable gift or not. There is another question which will arise if this be a good charitable gift—namely, whether the purpose is one to which effect can be given? If it turns out that effect cannot be given to the purpose for which this property and this fund were given, then the gift fails, or it must be applied cy près, and that is a question which, if the gift be a charitable one, I do not think it would be right to determine at the present time. I will say a word about that later on.

The first question to be determined is whether this is a good charitable gift? In my judgment the words which control the whole meaning of this clause are the three words: "Home of Rest." Prima facie at any rate, I think, a gift of a fund or property for the purpose of founding and endowing a Home of Rest is a charitable object. I think that that was the view which was taken by Kekewich J. in the case to which reference has been made: *In re Estlin.* (2) In that case it was a Home of Rest for lady teachers, and it was held to be a good charitable bequest. Mr. Johnston, who argued on behalf of the next of kin with great ability, sought to import into Kekewich J.'s decision that he had determined the question on the sole ground that the Home of Rest was a home for teachers, and that persons in the position of teachers, persons who were endeavouring to promote education, were themselves objects of charity, and that consequently a Home of Rest for teachers, which might enable them more adequately to fulfil their duties, would be a charitable gift. I think that the position in life of teachers,

(1) [1931] 1 Ch. 197. (2) 72 L. J. (Ch.) 687.

as teachers, had some influence on Kekewich J.'s mind from the way in which his judgment is expressed, but, as I read the first part of his judgment, his view was that to provide a Home of Rest is in itself prima facie a charitable object. He says: "To provide a home for those who need a home is, at any rate, charity in the broad sense of the word, whether it is within the statute of Elizabeth or not. One must not forget the distinction between the two; but still there is, to my mind, a distinct charity in providing a home for any one who needs a home." Then he proceeds to deal with the lady teachers who need rest. As I read the judgment, it does decide that to provide a Home of Rest is prima facie a charitable object. In my judgment that is so, and I think that it comes within the words of the Statute of Elizabeth. It may be that to provide a Home of Rest for a particular class of persons, who could not be in any sense described as in need of such a home, would not be charitable; but prima facie in my judgment the words "Home of Rest" themselves indicate something in the nature of a hospital, although not strictly a hospital, that is to say, a home which is to provide relief for those who are in need of it, not by means of medicine or medical attendance, but by providing them with the means and possibility of rest, and that is in my view in a true sense providing for the impotent, and accordingly to provide a Home of Rest is, in my judgment, prima facie a good charitable object. If that be so, if the provision of a Home of Rest is prima facie a good charitable object, then it does not necessarily follow that the gift will fail because some of the uses to which the Home may be put might, upon a right construction of the language of the will, be uses which would not be strictly charitable. To express what I mean in very much better language than mine own, I will refer to what Lord Davey said in the case of *Hunter* v. *Attorney-General* (1). He says: "A third class of cases was relied on by the Attorney-General, of which *Sinnett* v. *Herbert* (2) and *In re Douglas*, *Obert* v. *Barrow* (3), are examples, in which there is a general overriding

(1) [1899] A. C. 309, 324. (2) (1872) L. R. 7 Ch. 232.
(3) (1887) 35 Ch. D. 472.

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trust for charitable purposes, but some of the particular purposes to which the fund may be applied are not strictly charitable, or one of two alternative modes of application is invalid in law. In such cases the trust is good, and the Court will give effect to the general charitable trust, but the trustees are restricted from applying the fund to the purposes or in the manner which are objectionable."

In the present case, looking at the terms of this will, the object is to establish a Home of Rest, and the persons for whose benefit that Home of Rest is to be provided are, firstly, the Sisters of the Home of the Epiphany at Truro. That is an association of ladies for the purpose of doing charitable work. I do not think that it is necessary for me to consider exactly what is the position of these ladies, except to say that from the evidence it appears that under the rules the ladies who enter the community give up their private means, and are themselves, therefore, without means. The lady who desired to found this Home of Rest was anxious that among the persons who might benefit from such a home should be those ladies who carry on what is I think clearly a charitable work. Then there are the clergy, who are to have the advantage of the Home. The clergy of the diocese are clearly persons who are carrying on charitable work.

But when one comes to the words "such persons as the Mother Superior for the time being of the said Home of the Community of the Epiphany at Truro shall from time to time nominate and appoint," they would indicate that the Mother Superior, who is not a trustee, would have the widest possible discretion to appoint anybody she pleased, irrespective of their means or any question of that kind. I think that the words bear that meaning, but, in my judgment, when one reads the clause as a whole the duty of the Mother Superior (not because she is the Mother Superior of this particular Home, or in any way owing to her position in the Home, but owing to the fact that the object of the trust is charitable) is to nominate only such persons as are properly suitable to a Home of Rest as a charity, and if she were to nominate persons who were unsuitable for such a purpose, it

would, in my judgment, be the duty of the trustees to refuse such nomination. It is for the trustees to see that the Home of Rest is used and carried on as a charity, and, in my judgment, the power of the Mother Superior to nominate persons must be limited to that overriding purpose, and only such persons as are suitable for the Home can be properly nominated and appointed by her. The fact that the words of the sentence in the will are wide enough in themselves to enable her to appoint other persons, does not, in my judgment, prevent the whole gift from being charitable. I do not mean to suggest that the Mother Superior is in any way limited as to the persons to be appointed to the Sisters of the Home, or of a similar Home, or to persons who are engaged in some form of charitable work; she has an absolute discretion whom she will nominate, subject only to this, that the persons who can properly be nominated and admitted into the Home are persons who are suitable for the main object of the trust, which is charity, i.e., persons who are truly in need of a Home of Rest. If that be the true position, then there can be no objection to this gift on the ground that it is not a charity.

It appears from the evidence that there is some doubt whether such a Home of Rest can be established and maintained, having regard to the existing circumstances. I am by no means satisfied that it is not possible to establish and maintain such a Home, but I cannot determine that point now. In my judgment, the right course will be this, that the matter be referred to Chambers for an inquiry as to whether it is possible to establish such a Home as the testatrix intended to be established. If, as the result of that inquiry, it is found to be possible to establish such a Home, then a further reference to Chambers will be necessary to settle a scheme. If, on the other hand, it is found that the establishment of a Home is not practicable, then a further question will arise whether the gift fails or whether the bequest can be applied cy près. That is a question which may or may not arise according to the result of the first inquiry. I have thought it right not to determine that

FARWELL J. 1932 ISABEL JOANNA JAMES, *In re.* GRENFELL *v.* HAMILTON.

question now, but to leave that for consideration hereafter, if it becomes necessary to consider it.

I propose to make a declaration that this is a charitable gift, and to refer the matter to Chambers to inquire whether it is or will be at any future time practicable to establish such a Home as this.

[His Lordship made an order pursuant to s. 8 of the Mortmain Act, 1888, that the trustees might retain the house unsold.]

Solicitors: *Sydney James, for J. Messer Bennetts, Truro; Gregory, Rowcliffe & Co., for Sitwell & Harvey, Truro; Solicitor to the Treasury; Perowne & Co.*

E. K. C.

EVE J. 1932 *March* 8.

In re ARGONAUT MARINE INSURANCE COMPANY, LIMITED.

[No. 0020 of 1932.]

Insurance—Consignment of Wool Insured against Risks in Transit and in Storage—Marine Form of Policy—Risks of Fire and Pilferage included by Indorsement—Damage by Fire in Warehouse—Whether in Substance a Transit or a Fire Policy—Ultra vires the Insurance Company—Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *s.* 1; *s.* 28, *sub-s.* 3.

An insurance company carrying on a marine and general insurance business but excluding from its objects (inter alia) fire insurance business, insured, through agents in Germany, a consignment of wool whilst in transit from quay to warehouse and whilst stored in a warehouse, against all damage or loss for one month. The policy was on a printed marine form in the German language, and the risks of fire and pilferage were included by indorsement. The policy was twice renewed whilst the wool was in storage upon payment of the same premium. After the second renewal a fire occurred causing serious damage to the wool. The owners claimed under the policy and recovered judgment in Germany, and afterwards in the King's Bench Division, suing on the foreign judgment.

The insurance company having gone into liquidation, the applicants presented a proof for the amount of the judgment, but the liquidator rejected it:—

Held, that the policy, though on a marine form, was in substance one of fire insurance, the transit risks compared to the risk of fire in

storage being relatively negligible, and therefore the policy was ultra vires the company, and the liquidator was right in rejecting it. The qualification of s. 1 contained in sub-s. 3 of s. 28 of the Assurance Companies Act, 1909, did not apply to the case.

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SUMMONS in a winding-up.

By a policy of insurance in the German language dated June 9, 1928, the Argonaut Marine Insurance Company and four German insurance companies, acting by their authorized agents, Messrs. Grauerholz and Kohler, of Hamburg, insured the applicants, the Norddeutsche Wollkammerei, of Bremen, in the sum of $150,000 at a premium of .02 per 1000—i.e., $30 in respect of a consignment of raw wool for the transit from the quay at Harburg-Wilhelmsburg to a shed or warehouse in the same place, including any stay there during a period of one month, June 9 to July 9, 1928. The policy was made on a printed form, but by a typed indorsement warehousing risks against the dangers of fire and explosion on the basis of the general insurance conditions of the respective companies were included. Article 1 of the General Conditions of the policy provided that the company should be liable for all damage or loss which the insured goods might sustain in quality or quantity, and continued (as translated), "therefore especially are included in this insurance, partial or complete destruction, the risk of fire, of theft and pilferage." The applicants paid the premium, and on July 6 renewed the policy for one month for a further premium of $30, and on August 8 for another month for a further $30 until September 9, 1928, each extension being made by an annex to the policy.

On August 13, 1928, there occurred a partial loss by fire of the wool, the total damage amounting to $384,000. The damaged wool was sold by or on behalf of the insurance companies, and the proceeds, amounting to $133,047, were remitted to the applicants, who by November 30 were paid the whole amount of their loss except the share of the Argonaut Company, amounting to $9424.21 and interest thereon. The company refused to pay this amount to the applicants, who took proceedings against the company in

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the competent court at Hamburg. The company had previously contended that it was not justified in taking over the business of fire insurance, and that their agents had exceeded their authority in entering into the contract, but judgment was given for the applicants by default for $9424.21 and interest. The company having failed to pay, the applicants issued a writ in the King's Bench Division of the High Court, claiming 2167*l.* 8*s.* 10*d.*, the amount of the foreign judgment, and recovered judgment under Order XIV. Shortly afterwards the Argonaut Insurance Company went into liquidation. The applicants sought to prove in the liquidation for the amount of the judgment, but the liquidator, after taking the opinion of counsel, rejected the proof on the ground that the policy was a policy of fire insurance and ultra vires the company. By clause 8 of the company's memorandum of association the objects of the company were defined as "generally to carry on and transact every kind of guarantee business, etc., and every kind of transit insurance business and generally every kind of insurance and marine insurance business whether of the like or of a different kind . . . . except life assurance business fire insurance business or accident insurance business within the meaning of the Assurance Companies Act, 1909."

The applicants took out this summons, asking that the action of the liquidator should be reviewed and the proof admitted.

J. B. Lindon for the applicants. The only ground on which it could be said that the policy was ultra vires the company is that certain classes of insurance business, including fire insurance business, are excluded from the objects of the company as set out in the memorandum of association. Fire insurance business is defined in s. 1 (*b*) of the Assurance Companies Act, 1909, but the present case comes within the qualification contained in s. 28, sub-s. 3, of the Act. The policy was a marine or transit policy made on a printed form, and the fact that a clause of insurance against the risk of fire or explosion was added by indorsement in typescript

does not make it a policy of fire insurance. The indorsement did not change the character of the policy, nor did its extension: *Royal Exchange Assurance* v. *Hope.* (1) The proof ought to be admitted.

G. O. Slade for the liquidator. In substance the contract was one of fire insurance within s. 1, sub-s. 3, of the Assurance Companies Act, 1909, that being the principal risk insured against. The transport risks were negligible, as the transport was only from the quay at Harburg-Wilhelmsburg to a warehouse in the same place. The fact that the policy was in a marine or transit form is immaterial. The premium was calculated on the risk of fire, and in the two extensions the premium payable was the same, though at that date there was no transport risk. The risk of pilferage or theft in the case of a large consignment of wool was far less serious than the fire risk. Even if the policy was a marine or transit policy it was also a fire policy: *In re United London and Scottish Insurance Co.* (2) The policy cannot be brought within sub-s. 3 of s. 28 of the Act.

J. B. Lindon in reply. In the latter case the only risks insured against were the risks of fire. In substance this is a transport policy in which fire is included as an incidental risk, and it ought not to be deemed to be a fire policy: *Simon, Israel & Co.* v. *Sedgwick.* (3)

EVE J. This is an application on the part of a German firm to review the action of the liquidator in rejecting the proof they have lodged in the winding-up for damages caused by fire to a consignment of raw wool. The claim is based on a policy of insurance dated June 9, 1928, and the liquidator justifies the course he has taken by asserting that the policy is in substance a fire insurance policy and one into which the company had no power to enter. One cannot help regretting that the applicants should already have been involved in the expense of recovering judgments in Germany and in England, but now that the company is in liquidation

(1) [1928] Ch. 179. (2) [1915] 2 Ch. 12.
(3) [1893] 1 Q. B. 303, 307.

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the liquidator is bound to protect the assets for those who are legally entitled to participate in their distribution.

His case is that the policy—although purporting to be a transit one—was in substance an insurance against loss or damage by fire, and he relies on clause 8 of paragraph 3 of the company's memorandum of association as establishing that this class of insurance business is outside the company's powers. The company is thereby empowered to carry on every kind of transit insurance, and generally every kind of insurance business, except life assurance business, fire insurance business, accident insurance business, or employers' liability insurance business within the meaning of the Assurance Companies Act, 1909.

What I have to decide, therefore, is whether this is a fire insurance policy or a marine policy, and in considering that question s. 28, sub-s. 3, of the Act, whereby it is provided that the policy shall not be deemed to be a policy of fire insurance by reason only that loss by fire is one of the various risks covered by the policy, must be borne in mind. If the policy is a marine policy, then, although fire was one and only one of the risks insured against, it would not be within sub-s. (*b*) of s. 1 of the Act, but if according to its true construction it is a policy insuring against loss by or incidental to fire, then it is fire insurance business under the Act, and business which the company had no power to undertake. In the former case the claim of the applicants would be provable in the winding-up; in the latter case their right of proof is limited to the unexpired portion of the premium.

I have come to the conclusion that the liquidator's contention is right. The policy is in form a transit one, but was altered by indorsement so as to cover the wool while in transit or in storage against risk of fire or explosion. The transit part of the risk was of an almost negligible nature, involving only the transit of the wool from the quay to a shed or warehouse in the same place, and when, after the transit was over, the policy was renewed on two occasions, the same premium was charged as had been charged for the first period, which included transit, a clear indication that what was really

being insured against were the warehouse risks and not the transit. Moreover, the wording of the policy, specially including in the insurance the risk of partial or complete destruction by fire, discloses the real nature of the contract, and I feel bound to hold that this was the real risk insured against. I must, therefore, dismiss this summons, with costs.

Solicitors: *Stokes & Stokes; Stafford Clark & Co.*

H. L. L.

Referred to. *In re* DUKE OF NORTHUMBERLAND [1951] 1 Ch. 202

Applied. *Re* DUKE OF NORTHUMBERLAND (*decd*.). [1950] 2 All E.R. 1181.

In re BOROUGH COURT ESTATE.

[1930. B. 4982.]

Settled Land—Tenant for Life—Improvements in Mansion House—Expenditure by Tenant for Life—Improvements effected before 1926—*Some Improvements not authorized by Settled Land Acts,* 1882 *to* 1890—*Mansion House sold by Tenant for Life—Claim by Tenant for Life after Sale for Recoupment under Settled Land Act,* 1925—*Jurisdiction of Court to order Recoupment not ended by Sale—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *ss.* 84, 87; *Sch.* 3.

A tenant for life of settled property comprising a mansion house and land carried out in 1920 improvements not all of which were authorized by the Settled Land Acts, 1882 to 1890. He did not submit, as required by the Act of 1882, a scheme for approval by the Settled Land Act trustees or by the Court; and he paid for the improvements himself. In 1923 he sold most of the land, and in 1929 he sold the remainder of the land and the mansion house. On a summons by him asking (inter alia) that, pursuant to s. 87 of the Settled Land Act, 1925, the trustees might be directed or authorized to raise out of the capital moneys comprised in the settlement and to pay to him the costs of improvements authorized by the Settled Land Acts and executed at the cost of the tenant for life, notwithstanding that a scheme was not, before the execution of the improvements, submitted for approval, as required by the Settled Land Act, 1882, to the trustees of the settlement or the Court:—

Held, (i.) that the Court could authorize recoupment of the expenditure by the tenant for life on the settled land incurred before 1926, in so far as it was expenditure on "improvements" within the meaning of the Settled Land Act, 1925;

(ii.) that, having regard to ss. 84 and 87 of the Settled Land Act, 1925, the sale of the property did not terminate the Court's jurisdiction to order repayment;

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(iii.) that, as the applicant must at the time have expected himself to pay the sums spent on improvements which after 1925 came within Part II. of the Third Schedule to the Settled Land Act, 1925, the jurisdiction ought not to be exercised.

In re Lord Sherborne's Settled Estate [1929] 1 Ch. 345 and *In re Jacques Settled Estates* [1930] 2 Ch. 418 followed.

ORIGINATING SUMMONS.

Under a settlement created by the will and codicils of a testator who died in 1917, Wilfrid Harris-St. John (hereinafter called "the applicant") was tenant for life of property comprising land and a mansion house known as "Borough Court." In 1920 the applicant carried out repairs to "Borough Court," not all of which were authorized by the Settled Land Acts, 1882 to 1890, and paid for them himself. The repairs included the eradication of damp and dry rot, new drainage work, and the installation of a new water supply. The applicant, in exercise of his powers as tenant for life, sold most of the land in 1923, and the remainder of it and the mansion house in 1929. By this summons, he asked (inter alia) that, pursuant to s. 87 of the Settled Land Act, 1925 (1), the trustees might be directed or authorized to raise out of the capital moneys comprised in the settlement and to pay to him the costs of improvements authorized by the Settled Land Acts and executed at his cost, notwithstanding that a scheme was not, before the execution of the improvements, submitted for approval, as required by the Settled Land Act, 1882, to the trustees of the settlement or to the Court.

Roger Turnbull for the applicant. The applicant's claim ought not to be limited to what he spent on drainage. At the time when the work was done there were no moneys available under the settlement, and the applicant had no intention

(1) Sect. 87: "The court may, in any case where it appears proper, make an order directing or authorising capital money to be applied in or towards payment for any improvement authorised by the Settled Land Acts, 1882 to 1890, or this Act, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval, as required by the Settled Land Act, 1882, to the trustees of the settlement or to the court, and notwithstanding that no capital money is immediately available for the purpose."

of paying for the improvements out of his own pocket. The Court should, in the exercise of its discretion, order recoupment to him of the costs of all the improvements.

[He referred to *In re Lord Sherborne's Settled Estate* (1) and *In re Jacques Settled Estates.* (2)]

L. W. Byrne for the trustees. The trustees feel that some repayment ought to be made to the applicant. They do not, however, think that the entire costs of the improvements should be repaid to him, and they feel a great difficulty in expressing an opinion how far the recoupment should extend.

H. S. G. Buckmaster for the remainderman. This is not a case in which the Court should sanction the repayment of the costs of any of the improvements out of capital. But if it does sanction any repayment, it should sanction the repayment of the costs of drainage only.

[He referred to *In re Jacques Settled Estates* (2); *In re Hotchkin's Settled Estates* (3); and *In re Tucker's Settled Estates.* (4)]

MAUGHAM J. [after stating the facts:] Two facts must be noticed in limine: first, that the expenditure was incurred over ten years ago, and secondly, that the property which was the subject of it no longer forms part of the settled estate. It is also to be observed that, although capital moneys were available in 1923, the tenant for life did not apply for recoupment of any part of the expenditure. Although the present application is for recoupment of expenditure which was incurred before the Settled Land Act, 1925, came into force, in respect of improvements, many of which were not authorized by the Settled Land Acts, 1882 to 1890, the Court can order repayment of sums properly coming under the Settled Land Act, 1925, since they are now authorized under that Act. The authority for that is *In re Lord Sherborne's Settled Estate.* (1)

It is, therefore, clear that there is jurisdiction in the Court, and the question that arises is whether that jurisdiction

(1) [1929] 1 Ch. 345.
(2) [1930] 2 Ch. 418.
(3) (1887) 35 Ch. D. 41.
(4) [1895] 2 Ch. 468.

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ceases when the property is no longer part of the settled estates. In the course of his judgment in *In re Hotchkin's Settled Estates* (1) Cotton L.J. said: "I feel great doubt whether the Act" (the Settled Land Act, 1882) "empowers us to authorise the trustees to pay out of capital money the expense of improvements on lands which are no longer in settlement."

In my opinion, having regard to the provisions of ss. 84 and 87 of the Settled Land Act, 1925 (2), it would be wrong

(1) 35 Ch. D. 41, 46.

(2) Sect. 84, sub-s. 1: "Capital money arising under this Act may be applied in or towards payment for any improvement authorised by this Act or by the settlement, without any scheme for the execution of the improvement being first submitted for approval to, or approved by, the trustees of the settlement or the court."

Sub-s. 2: "Where the capital money to be expended is in the hands of the trustees of the settlement, they may apply that money in or towards payment for the whole or any part of any work or operation comprised in the improvement, on—

(i) a certificate to be furnished by a competent engineer or able practical surveyor employed independently of the tenant for life, certifying that the work or operation comprised in the improvement or some specific part thereof, has been properly executed, and what amount is properly payable in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or

(ii) an order of the court directing or authorising the trustees so to apply a specified portion of the capital money:

Provided that—

(*a*) In the case of improvements not authorised by Part I. of the Third Schedule to this Act or by the settlement, the trustees may, if they think fit, and shall if so directed by the court, before they make any such application of capital money require that that money, or any part thereof, shall be repaid to them out of the income of the settled land by not more than fifty half-yearly instalments, the first of such instalments to be paid or to be deemed to have become payable at the expiration of six months from the date when the work or operation, in payment for which the money is to be applied, was completed;

(*b*) No capital money shall be applied by the trustees in payment for improvements not authorised by Parts I. and II. of the Third Schedule to this Act, or by the settlement, except subject to provision for the repayment thereof being made in manner mentioned in the preceding paragraph of this proviso."

Sub-s. 3: "Where the capital money to be expended is in court, the court may, if it thinks fit, on a report or certificate of the Minister" (i.e., as defined by s. 117, sub-s. 1

to come to the conclusion that the jurisdiction of the Court ceases when the property which has been improved is sold. The effect of so holding would be that, when a tenant for life wished to sell the property or was advised to do so, he would be faced by the difficulty that, if he did sell, he would be depriving himself of his right, under the Settled Land Act, 1925, to apply to the Court for recoupment of money paid for improvements. That conclusion would be directly contrary to the policy of the Act, and, in my opinion, under the present law, having regard to the fact that the Court has jurisdiction to order the repayment of sums paid in the past by the tenant for life, the right conclusion is that the jurisdiction continues after the property is sold.

I must now consider whether I ought to exercise the jurisdiction in the present case. I accept as a sound guidance the statement made by Eve J. in *In re Jacques Settled Estates.* (1) The learned judge there says: "Speaking for myself, I think that the opinion expressed by North J. in *In re Ormrod's Settled Estate* (2) is a very salutary one to bear in mind in connection with applications of this nature.

para. (xvi), of the Act, the Minister of Agriculture and Fisheries), "or of a competent engineer or able practical surveyor approved by the court, or on such other evidence as the court may think sufficient, make such order and give such directions as it thinks fit for the application of the money, or any part thereof, in or towards payment for the whole or any part of any work or operation comprised in the improvement."

Sub-s. 4: "Where the court authorises capital money to be applied in payment for any improvement or intended improvement not authorised by Part I. of the Third Schedule to this Act or by the settlement, the court, as a condition of making the order, may in any case require that the capital money or any part thereof, and shall as respects an improvement mentioned in Part III. of that Schedule (unless the improvement is authorised by the settlement), require that the whole of the capital money shall be repaid to the trustees of the settlement out of the income of the settled land by a fixed number of periodical instalments to be paid at the times appointed by the court, and may require that any incumbrancer of the estate or interest of the tenant for life shall be served with notice of the proceedings."

Sub-s. 5: "All money received by the trustees of the settlement in respect of any instalments under this section shall be held by them as capital money arising from freehold land under the settlement, unless the court otherwise directs."

(1) [1930] 2 Ch. 418, 420.

(2) [1892] 2 Ch. 318, 326.

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He had there to deal with the question of recouping a tenant for life for certain expenditure he had incurred without having submitted antecedently a scheme of his proposals to the trustees, and the learned judge, who was prepared to assume that s. 15 of the Settled Land Act, 1890, authorizing the recoupment of expenditure incurred without a scheme was retrospective, nevertheless refused to allow recoupment, on the ground that the tenant for life had deliberately done the work with the object, no doubt, of benefiting the estate, but with the full knowledge that the money expended could not be recovered from capital, and that in these circumstances he must be presumed to have intended to make the expenditure his own, and not to cast it upon the corpus of the estate. I think that is a precedent to be borne in mind when applications are made under the present Act for the retrospective exercise by the Court of its discretion in favour of tenants for life. I can imagine a large number of improvements, especially those which do not cost much individually, but which in the aggregate may amount to a large sum, with respect to which the Court would not exercise its discretion by giving a retrospective effect to the legislation of 1925, but would leave the tenant for life who had incurred those expenses without any idea of getting them back in the position in which he must have known himself to be when the expenditure was incurred."

The Settled Land Act, 1925, deals with the matter in a way different from that in which the Settled Land Acts, 1882 to 1890, dealt with it, and there is given, in Part II. of the Third Schedule to that Act, a list of improvements the cost of which the trustees of the settlement or the Court may require to be replaced by instalments, and in Part III. of that Schedule a list of improvements the cost of which the trustees of the settlement or the Court must require to be replaced by instalments. In a case in which the application for recoupment is made long after the work has been done, if the improvements are within Part II. or Part III. there is strong ground for so exercising the discretion that prima facie the costs of the improvements or a portion of

them will be thrown upon the tenant for life, that is, he should be treated as if he had been required to pay the costs by instalments as from the date when the improvements were made. The Court clearly ought not to regard the application of a tenant for life more favourably when he has abstained from formulating a scheme, and the same proposition is true if he has incurred most of the expenditure at a time when there was no power to order that it should be recouped.

In the present case it is clear that that part of the work which consisted of drainage was properly attributable to capital moneys under the Settled Land Acts, 1882 to 1890, and in 1923 application for recoupment might have been made under those Acts. I think that, to that extent, this application should in the circumstances be allowed. But if I were now to exercise the jurisdiction of the Court to order the repayment to the applicant of the costs incurred in carrying out improvements which now come under Part II. of the Third Schedule to the Settled Land Act, 1925, the right course would be to require him to replace the whole of the costs of those improvements by instalments treated as commencing as from the date when the work was done. It is true that, if that jurisdiction had been exercised earlier, the Court might have required the money to be repaid by instalments over a period extending beyond the present time. But, having regard to the great probability that the applicant knew that sums expended by him on improvements which now come within Part II. of the Third Schedule to the Settled Land Act, 1925, could not have been recovered under the law as it stood at the date when he carried out those improvements, and that he must have expected to pay those sums out of his own pocket, I do not think that he will be suffering any injustice if the Court does not order that they be recouped to him.

In regard to the drainage, it would be fair to allow a proper sum to be recouped to the applicant, as the expenditure has no doubt gone to enhance the value obtained upon the sale of the mansion house.

Solicitors: *Rider, Heaton, Meredith & Mills; Burch & Co.*

K. R. A. H.

EVE J.

1932

Jan. 29:
Feb. 2, 16.

In re LEE, BEHRENS AND COMPANY, LIMITED.

[No. 00243 of 1931.]

Company—Winding-up—Managing Director—Grant of Pension to Widow of Director—Deed of Covenant—No Confirmation in General Meeting—Whether reasonably incidental to Business of Company—Gratuity—Rejection of Proof—Ultra vires.

A private company, the articles of which authorized the directors to provide for the welfare of employees and their widows and children, entered into a deed of covenant by which it granted a pension of 500*l.* a year to the widow of a former managing director five years after his death. Some three years later the company passed a resolution for voluntary winding-up. The widow lodged a proof in the winding-up for the capitalized value of the annuity, but the liquidator rejected it :—

Held, that the transaction was not one for the benefit of the company or reasonably incidental to the company's business. The pension did not come within the terms of the company's articles, as a managing or other director is not a person in the employment of a company, and the action of the directors was not confirmed by the shareholders in general meeting convened for the purpose of doing so. The grant of the pension was therefore void and ultra vires the company.

SUMMONS in a winding-up.

The company, Lee, Behrens & Co., Ld., was incorporated as a private company in 1909, and a resolution for voluntary liquidation was passed on March 10, 1931. J. R. Southerden was its managing director for many years, and died in September, 1923. On June 10, 1928, the company released by deed certain claims which it had against his estate, and executed a deed of covenant whereby the company and another associated private company, S. L. Behrens & Co., Ld., jointly and severally covenanted to pay to Mrs. Gertrude Elizabeth Southerden, the widow of J. R. Southerden, an annuity of 500*l.* for her life as from November, 1927. As between the two companies it was agreed that the primary liability for the annuity was to fall on Lee, Behrens & Co., Ld. The applicant Mrs. Southerden lodged a proof in the winding-up for 8000*l.*, the capitalized value of the annuity, but the liquidator rejected the proof on the grounds (1.) That it was ultra vires the company and void ; (2.) alternatively that it could only be authorized by the company

in general meeting and that no such meeting was summoned or held; (3.) that it was a mere gratuity which could only be paid out of profits, and that there were no profits out of which to pay it.

The applicant took out this summons to have the decision of the liquidator reviewed.

Manning K.C. and *Harold Christie* for the applicant. The pension for which the applicant claims to prove was granted by the company in consideration of the valuable services rendered to it by her late husband. The grant was not ultra vires the company; there is power under the articles to provide for the welfare of persons in the employment of the company, or formerly in its employment, and their widows and children, and the applicant comes within that clause. The case is covered by the decision in *Henderson* v. *Bank of Australasia* (1), where the payment of a pension to a bank manager's widow was upheld. *Hutton* v. *West Cork Ry. Co.* (2) was an entirely different case: there a company had been absorbed by another company, and it was held that the directors of the former company could not vote themselves compensation for being deprived of office. The validity of the grant of a pension to a retiring secretary was upheld in *Cyclists' Touring Club* v. *Hopkinson.* (3) This decision was recently followed by Bennett J. in *Wimbledon and Putney Commons Conservators* v. *Tuely.* (4) The dictum of Keating J. in *Marchant* v. *Lee Conservancy Board* (5) to the effect that a statutory corporation cannot make a retiring allowance to an employee without having express power enabling them to do so is of no authority, and was not necessary for the decision in that case.

It is true that there was no consideration moving from the applicant to the company, but the pension was granted by deed of covenant, and consideration is not required to support it.

(1) (1888) 40 Ch. D. 170.
(2) (1883) 23 Ch. D. 654.
(3) [1910] 1 Ch. 179.
(4) [1931] 1 Ch. 190.
(5) (1874) L. R. 9 Ex. 60, 62.

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If the company had not gone into liquidation the applicant could have sued it, if the annuity had got into arrear, and the liquidator cannot be in any better position. The debt is no exception to the debts payable pari passu.

A. de W. Mulligan for the liquidator. The annuity granted to the applicant was a purely voluntary and gratuitous payment by the company. The company has power under its memorandum to grant pensions to the widows of men who have been in its employment, but for the purposes of this clause a director is not a person in the employment of the company: *Normandy* v. *Ind, Coope & Co.* (1) There is a similar statement of the law in *Hutton* v. *West Cork Ry. Co.* (2)

The applicant cannot be in a better position than her husband would have been if he had retired in his lifetime, and the directors had voted him a pension. No general meeting of the company was called or held for the purpose of proposing or approving the grant of a pension. The only authority for the payment is a minute of a Board meeting, dated April 11, 1928, recording that it was resolved that the three documents received from the applicant's solicitors, the release, the agreement, and the deed of covenant, be executed. The fact that this was a private company with very few shareholders, and that the directors all agreed to the grant, makes no difference: *In re George Newman & Co.* (3)

In the present case the applicant is in competition with the company's creditors. In *Cyclists' Touring Club* v. *Hopkinson* (4) the competition was only with the members of the company. The onus is on the applicant to prove that there was a binding contract between the late J. R. Southerden and the company that his widow if surviving him should be granted a pension; the company is not bound except by such a contract. Further, this being a voluntary payment made less than ten years before the winding-up of the company the onus is on the applicant to show that the company was solvent at the date when it was resolved on.

(1) [1908] 1 Ch. 84, 95.
(2) 23 Ch. D. 654.
(3) [1895] 1 Ch. 674.
(4) [1910] 1 Ch. 179.

[*Manning K.C.* This was not one of the grounds on which the liquidator rejected the proof, and therefore it is too late to raise it.]

Mulligan. The point was raised by the liquidator when he said it was a mere gratuity. See the Bankruptcy Act, s. 42, sub-s. 4. The Bankruptcy Rules apply: *Ex parte Pottinger.* (1)

The definition in s. 42 of the Bankruptcy Act is inclusive, not exclusive. The onus is on the applicant to show that the company was able to pay the whole of its debts, plus this 8000*l.*, and she has not attempted to discharge this onus.

The ratio decidendi in cases where the company is a going concern, such as *Cyclists' Touring Club* v. *Hopkinson* (2), is quite different from that in cases where the company is being wound up, as *Hutton* v. *West Cork Ry. Co.* (3) and *Stroud* v. *Royal Aquarium, &c., Society, Ld.* (4) What is reasonable and proper for a company carrying on business would not be so for a company in liquidation.

Directors are not employees, and it is their duty to give their services to the company. Any payment to a director not in accordance with the articles is a gratuity: *Hampson* v. *Price's Patent Candle Co.* (5)

Manning K.C. in reply referred to *In re Leng* (6) and *In re Express Engineering Works, Ld.* (7)

Cur. adv. vult.

Feb. 16. EVE J. Lee, Behrens & Co., Ld. (hereinafter referred to as "the company"), was incorporated in January, 1909, and went into voluntary liquidation on March 10, 1931. The applicant, Mrs. Gertrude Elizabeth Southerden, lodged a proof in the winding-up for the sum of 8000*l.*, the capitalized value of an annuity of 500*l.* per annum, alleged to be payable to her by virtue of a deed of covenant dated June 29, 1928, and on November 3, 1931, the liquidator rejected the claim on the grounds: (1.) That the contract to pay the

(1) (1878) 8 Ch. D. 621.
(2) [1910] 1 Ch. 179.
(3) 23 Ch. D. 654.
(4) (1903) 89 L. T. 243.
(5) (1876) 45 L. J. (Ch.) 437.
(6) [1895] 1 Ch. 652.
(7) [1920] 1 Ch. 466.

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annuity was ultra vires of the company and void; (2.) alternatively, that the contract could only be authorized by a meeting of the shareholders duly convened for that purpose, and there was no such meeting ever convened or held; and (3.) that the annuity was a mere gratuity which it was ultra vires of the company to pay otherwise than out of profits, and that since June, 1928, there have not been, and there never will be, any profits out of which to pay it. The company is insolvent.

By the present summons the applicant seeks to have the decision of the liquidator reviewed and her claim admitted. The relevant facts are as follows: the company was a private one closely associated with another private company known as S. L. Behrens & Co., Ld., and for some years the applicant's husband, the late Mr. J. R. Southerden, acted as managing director of the company. He died on September 23, 1923, and at a Board meeting held on October 24, whereat were present Mr. G. B. and Mr. N. E. Behrens, a resolution was passed placing on record their great regret at the loss they had sustained by the death of Mr. Southerden, "who rendered invaluable services to the company during the many years he was associated with it." On March 19, in the following year (1924), a resolution was passed by the Board agreeing the commission due to the deceased to the date of his death at 533*l.* 9*s.* 1*d.* Nothing further relating to Mr. Southerden or the applicant is to be found in the minute book until June 29, 1928, when there was a meeting of the Board, whereat it was resolved that three documents, received from Messrs. W. W. Young, Sons & Ward, relative to the estate of J. R. Southerden, be executed. The three documents were an agreement, a release and indemnity and a deed of covenant.

It is not necessary to examine the first two of these documents in any detail. They relate to the administration of Southerden's estate, and it appears therefrom that at the time of his decease he was indebted to the company to a considerable amount, and that after his death the company made large payments to his widow of a voluntary and

benevolent character. By the third of the three deeds made between the company and S. L. Behrens & Co., Ld. (thereinafter together referred to as "the two companies"), of the one part, and the applicant of the other part, the two companies, in consideration of the services rendered by the late husband of the applicant during his life to the two companies or one of them, thereby jointly and severally covenanted with the applicant that the two companies should and would pay to her during her life by quarterly payments an annuity of 500*l.* calculated from November 11, 1927, and it was thereby provided that although, as between the applicant and the two companies, such companies were jointly liable as principals for the payment of the said annuity, as between such other parties the company was principally liable and the other company was to be a surety only.

It is not contended, nor in the face of a number of authorities to the contrary effect could it be, that an arrangement of this nature for rewarding long and faithful service on the part of persons employed by the company is not within the power of an ordinary trading company such as this company was, and indeed in the company's memorandum of association is contained (clause 3) an express power to provide for the welfare of persons in the employment of the company or formerly in its employment, and the widows and children of such persons and others dependent upon them by granting money or pensions, providing schools, reading rooms or places of recreation, subscribing to sick or benefit clubs or societies or otherwise as the company may think fit.

But whether they be made under an express or implied power, all such grants involve an expenditure of the company's money, and that money can only be spent for purposes reasonably incidental to the carrying on of the company's business, and the validity of such grants is to be tested, as is shown in all the authorities, by the answers to three pertinent questions: (i.) Is the transaction reasonably incidental to the carrying on of the company's business? (ii.) Is it a bona fide transaction? and (iii.) Is it done for the benefit and to promote the prosperity of the company?

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Authority for each of the foregoing propositions is to be found in the following cases: *Hampson* v. *Price's Patent Candle Co.* (1); *Hutton* v. *West Cork Ry. Co.* (2); and *Henderson* v. *Bank of Australasia.* (3)

In the present case the Court is left entirely without any material for determining whether the transaction was characterized by any of these several attributes. Assuming, as I am quite prepared to do, that there are no grounds for impugning the bona fides of the Board or the applicant, no one of them has given evidence to suggest that the course adopted was taken for the benefit or to promote the prosperity of the company or that the execution of the deed of covenant and the assumption of so burdensome a liability was reasonably incidental to the carrying on of the company's business. All that I have in the way of evidence are affidavits proving the death of Southerden and probate of his will, verifying the memorandum and articles and the minute book of the company, the three deeds executed on June 29, 1928, and the certificate of the applicant's birth. Neither of the two directors who authorized the sealing of the deeds has made any affidavit, and the only material paragraphs in the applicant's affidavit are paras. 2 and 3, where she says: "(2.) My late husband was for many years prior to his death managing director of the company. (3.) After the decease of my said husband considerable negotiations took place between me and the directors of the company and S. L. Behrens, Ld., with a view to providing me with a pension, and eventually it was agreed that the company and S. L. Behrens, Ld., and myself should enter into a deed of covenant under which the company and S. L. Behrens, Ld., were to jointly and severally pay me an annuity of 500*l.*"

The conclusion to which in my opinion such evidence as is available irresistibly points is that the predominant, if not the only, considerations operating in the minds of the directors, was a desire to provide for the applicant, and that the question what, if any, benefit would accrue to the company never presented itself to their minds.

(1) 45 L. J. (Ch.) 437. (2) 23 Ch. D. 654. (3) 40 Ch. D. 170.

If there were nothing more in the case than what I have just indicated, I should feel myself bound in the circumstances to support the liquidator's rejection of this lady's proof.

But there is another and perhaps more insurmountable difficulty with which she is faced, and it is this, that this annuity is a gift or reward given out of the company's assets by the directors to one of their own body, and this is something they cannot do unless authorized by the instrument which regulates the company or by the shareholders at a properly convened meeting—that is, a meeting convened by a notice disclosing the intention to make the proposal. The authority for this proposition is the case of *In re George Newman & Co.* (1)

The paragraph I read earlier in this judgment from the company's memorandum does not assist the plaintiff, for "a director is not a servant" of the company: per Bowen L.J. in *Hutton* v. *West Cork Ry. Co.* (2); nor is any managing or other director a person in the employment of the company: *Normandy* v. *Ind, Coope & Co.* (3)

The alternative of getting authority from the shareholders at a meeting duly convened for the purpose was never thought of, or, if thought of, was dismissed as superfluous, inasmuch as the shares were in the hands of so few, and so far as was known nobody was likely to object. It was the same in *Newman's* case, but Lord Lindley, in giving judgment on behalf of Lord Halsbury, A. L. Smith L.J. and himself, disposed of this point in the following terms (4): "Even if the shareholders in general meeting could have sanctioned the making of these presents, no general meeting to consider the subject was ever held. It may be true, and probably is true, that a meeting, if held, would have done anything which Mr. George Newman desired; but this is pure speculation, and the liquidator, as representing the company in its corporate capacity, is entitled to insist upon and to have the benefit of the fact that even if a general meeting could

(1) [1895] 1 Ch. 674.
(2) 23 Ch. D. 672.
(3) [1908] 1 Ch. 84.
(4) [1895] 1 Ch. 686.

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have sanctioned what was done, such sanction was never obtained. Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting. The company is entitled to the protection afforded by a duly convened meeting, and by a resolution properly considered and carried and duly recorded." All of which is peculiarly appropriate to the present case. In my opinion, the rejection of this proof by the liquidator was quite right, and I must therefore dismiss this summons with costs.

Solicitors: *Billinghurst, Wood & Pope; W. W. Young, Sons & Ward.*

H. L. L.

EVE J. 1932 *March* 16, 17.

In re PRICE.

TRUMPER *v.* PRICE.

[1932. P. 496.]

Will—Specific Legacy—Misdescription—Gift of "my 400l. five per cent. War Loan"—National War Bonds formerly belonging to Testatrix—Similar Amount—Conversion before Will—Conversion Stock and Treasury Bonds—No other Investment.

A testatrix by her will gave a legacy of "my 400*l.* five per cent. War Loan, 1929/1947." She had never had any War Loan, but some time before the date of her will acquired 400*l.* National War Bonds. These were converted by her, 200*l.* into 284*l.* 3½ per cent. Conversion Stock, and 200*l.* into 5 per cent. Treasury Bonds, in each case before the date of the will. The testatrix possessed no other investments at the date of her death:—

Held, that the converted stocks passed under the description of "War Loan."

ORIGINATING SUMMONS.

The summons was taken out by one of the executors of the will dated March 31, 1930, of Sarah Price, who died on September 19, 1931. Her will was duly proved on

November 21, 1931. The question raised was whether under a gift to her niece, Hannah Louisa Price, of " my 400*l.* five per cent. War Loan, 1929/1947," two sums of 284*l.* 3½ per cent. Conversion Stock, and 211*l.* 5 per cent. Treasury Bonds, representing the conversion of 400*l.* National War Bonds, passed to the legatee. The testatrix at no time possessed any War Loan, and the above were the only investments she possessed at the date of her death.

G. P. Slade for the plaintiff.

R. W. A. Speed for the specific legatee, the defendant, H. L. Price. The two sums of Conversion Stock and Treasury Bonds, though misdescribed as " War Loan," passed to the legatee. There is nothing else on which the bequest can operate. The only explanation is that she considered all securities raised to prosecute the War as being " War Loan." She had had 400*l.* National War Bonds, which had been converted into the present securities: *In re Jameson* (1); *In re Weeding* (2); *Door* v. *Geary* (3), where Bank Stock was held to pass under the misdescription of East India Stock; *In re Ionides; London County, Westminster, &c., Bank* v. *Craies* (4), where a gift of " my War Loans " was held to pass 5½ per cent. Exchequer Bonds; *In re Balchin; Havenhand* v. *Perugia.* (5)

G. T. Whitfield-Hayes for the residuary legatee. These converted stocks have no connection with War Loan, but have been converted from National War Bonds. There is no modern case in which the difference between the security described and that held to pass under a misdescription is so great as it is here. In *In re Jameson* (1) the testator originally held shares in the bank described in his will, which was afterwards absorbed by another bank. The decision in *In re Ionides* (4) goes furthest, but not far enough to cover the present case. Nothing could be more exact than the description of the War Loan, including the period of years

(1) [1908] 2 Ch. 111.
(2) [1896] 2 Ch. 364.
(3) (1749) 1 Ves. Sr. 255.
(4) (1922) 38 Times L. R. 269.
(5) (1922) 38 Times L. R. 868.

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during which it might be redeemed, and yet the testatrix never held any stock to which the description could refer.

EVE J. This case is not quite covered by any of the authorities, though it may be by the principles laid down in some of them. The testatrix, who died on September 19, 1931, made her will on March 20, 1925, and thereby gave to her niece, Hannah Louisa Price, "my 400*l.* five per cent. War Loan, 1929/1947," but she never at any time had any War Loan, though before 1925 she had acquired 400*l.* National War Bonds, and by a will made in that year she made a similar gift in exactly the same words—namely, as "five per cent. War Loan, 1929/1947." Later on she converted her War Bonds in two instalments, first, 200*l.* into 284*l.* 3½ per cent. Conversion Stock, and secondly, the remaining 200*l.* into 211*l.* 5 per cent. Treasury Bonds, and she continued to hold these two investments at the time of her death. Is the specific legatee entitled to these two sums of Conversion Stock and Treasury Bonds in substitution for the War Loan which the testatrix gave her by her will, but did not possess? The stocks she held at her death represented 400*l.* National War Bonds, and she had no other investments whatever.

It is clear that the testatrix must have forgotten the correct description of her investments. It was contended by Mr. Whitfield-Hayes that it would be taking a step in advance of all previous decisions if it were held that the legatee was entitled to succeed. But it must be remembered that the testatrix was not a woman of any great education; the will was prepared by a solicitor, and it may well be that he did not think it necessary to inquire into the exact nature of her investments: had he done so he would have discovered that the money she had originally invested was invested in National War Bonds and never properly described as War Loan.

The conclusion seems irresistible that the testatrix regarded any investment she made in securities created for the purpose of helping the country during the War as "War Loan," and I think I should be shutting my eyes to what everybody

must in his own mind regard as obvious if I were to hold that the misdescription is fatal to the gift. Even if it involves carrying the rule of falsa demonstratio further than it has yet been carried, I feel bound to hold that this clause operates to vest in the legatee the two sums of 284*l.* 3½ per cent. Conversion Stock and 211*l.* 5 per cent. Treasury Bonds, and the question raised on the summons must so be answered.

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Solicitors: *Russell, Son & Fisher, for F. A. Trumper, Hay, Herefordshire.*

H. L. L.

In re SALTING.

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[1932. S. 499.]

EVE J.
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March 15; *April* 5, 6, 12, 15.

Will—Settled Legacy—Protected Life Interest—Forfeiture upon Alienation—Application to raise Capital Moneys for Benefit of Tenant for Life—Order to effect Policy of Assurance to be assigned to Trustees—Premiums to be paid out of Income—No Forfeiture if Premiums paid by Tenant for Life—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 57.

The tenant for life of a settled legacy whose life interest was protected against any assignment or charge "whereby the income or some part thereof would if belonging absolutely to him become payable to some other person or a corporation," with a gift over upon failure of such trust, applied to the Court under the powers of s. 57 of the Trustee Act, 1925, for an order to authorize the trustees to raise 15,000*l.* out of the capital of the settled legacy, which amounted to 150,000*l.*, and to apply the same in payment of his debts and generally for his benefit.

An order was made authorizing the trustees to raise the money and to apply it accordingly, upon the terms that the tenant for life should effect a policy for 15,000*l.* upon his own life and assign the same to the trustees to secure repayment of the capital raised, and that the trustees should pay the premiums on the policy out of the income unless the plaintiff should within seven days of each renewal date produce to the trustees a receipt for the amount of the premium paid to the insurance company.

On a summons taken out to determine the question whether the tenant for life by applying for and obtaining this order had forfeited his life interest:—

Held, that so long as the tenant for life paid the premiums on the policy and produced the receipt for them to the trustees, so that the

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trustees were not called upon to apply any part of the income of the legacy in payment of the premiums, the order would not effect a forfeiture of the life interest.

In re Brewer's Settlement [1896] 2 Ch. 503 applied.

ORIGINATING SUMMONS.

The testatrix, Millicent Emily Salting, by her will dated July 25, 1917, as varied by a codicil of July 21, 1923, bequeathed 150,000*l.* to her trustees upon trust for investment and to pay the income thereof to the plaintiff, the Hon. Charles Baillie-Hamilton, until he should assign, charge or otherwise execute, do, or suffer some deed, act or thing (other than giving a consent to a power of advancement in favour of his children) whereby the income or some part thereof would, if belonging absolutely to him, become payable to some other person or corporation, and upon failure of such trust in his lifetime then upon discretionary trusts for the benefit of the plaintiff or his wife or children, or, if there should be no wife or children of the plaintiff in existence, for the benefit of other persons.

The testatrix died on September 4, 1924, and her will and codicil were duly proved on October 30, 1924. The plaintiff, who was married but had no children, applied to the Court by summons for authority to the trustees of the will to raise 15,000*l.* out of the capital of the trust legacy and to apply the same in discharge of debts and otherwise for his benefit upon his effecting a policy of assurance for 15,000*l.* upon his own life and assigning it to the trustees to secure repayment of the advance. The application was made under s. 57 of the Trustee Act, 1925. (1)

(1) The Trustee Act, 1925, s. 57, provides as follows:—

"(1.) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised

By an order dated March 7, 1925, it was ordered that the trustees should raise the sum of 15,000*l.* out of the capital of the legacy and pay and apply the same as therein mentioned, and that the plaintiff should forthwith effect a policy of assurance upon his own life for 15,000*l.* and assign the same and the benefit thereof to the trustees to be held upon the trusts affecting the settled legacy for the time being, and that the trustees should pay the premiums on the policy, other than the first premium, which was to be paid out of capital, out of the income of the trust legacy, unless the plaintiff should within seven days of each renewal date produce to the trustees a receipt for the amount of the premium. The question raised by the present summons was whether under the order made in this form the plaintiff's protected life interest would be forfeited.

Fergus D. Morton K.C. and *C. E. Harman* for the plaintiff. The question is whether upon the true construction of the will of the testatrix and in the events which have happened—namely, the making of an order on March 7 to raise the sum of 15,000*l.* out of the settled funds—the plaintiff's life interest thereunder has been determined. We ask for an amendment of the original order under Order XXVIII., r. 11, so as to require the plaintiff to pay the premiums on the policy of assurance taken out by him, and the trustees to pay them if he does not produce a receipt for the premium within seven days of the due date for payment.

On the true construction of the clause giving the plaintiff a protected life interest no income has become payable, in consequence of the order, to any other person whatever. The wording of the clause does not fit the events which have

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to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

(2.) The court may, from time to time, rescind or vary any order made under this section, or may make any new or further order.

(3.) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

(4.) This section does not apply to trustees of a settlement for the purposes of the Settled Land Act, 1925."

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happened. The Trustee Act, 1925, was passed after the testatrix died, and the effect of an order of the Court under s. 57 is to enable the trustees to write the section into the will: *Cox* v. *Bockett.* (1)

Every case of forfeiture is on its own footing, and if the exact event provided for is not covered there is no forfeiture. The raising of the 15,000*l.* has not created a forfeiture of income: all that has happened is that certain persons have received, or will receive, sums in cash out of capital: *In re Brewer's Settlement* (2); *In re Mair.* (3) The tenant for life has not been deprived of any of his income.

No exercise of any power by the Court can cause a forfeiture of the interest of the tenant for life. The consent to the exercise of a power of advancement in a settlement will not do so: *In re Hodgson.* (4) The words of a forfeiture clause must be strictly construed: *In re Carew's Trusts* (5); *Loraine* v. *Loraine.* (6)

We submit (1.) that there has been no forfeiture, and (2.) that even if the trustees pay the premiums there will be no forfeiture.

The Trustee Act, 1925, s. 57, is a purely administrative provision, and should not be interpreted as altering the rights of the parties.

J. Neville Gray for persons entitled under the discretionary trust. The effect of the order is to vary the trusts of the will. In the case of the exercise of a power of advancement there is no forfeiture if the power is one contained in a settlement: *In re Hodgson* (4), but in the case of a statutory power outside the settlement there is a forfeiture: *In re Stimpson's Trusts.* (7) *In re Carew's Trusts* (5) is not distinguishable. The words of the will in the present case are almost identical with the corresponding clause in the settlement in *In re Hodgson* (8), where Neville J. said the clause was wide enough to cover what had been done in that case, because by an act of the tenant for life he had enabled income which

(1) (1865) 35 Beav. 48.
(2) [1896] 2 Ch. 503.
(3) [1909] 2 Ch. 280.
(4) [1913] 1 Ch. 34.
(5) (1911) 103 L. T. 658.
(6) [1912] P. 86, 222.
(7) [1931] 2 Ch. 77.
(8) [1913] 1 Ch. 34, 39.

would otherwise have been paid to him to become payable to somebody else, but he held that a mere consent to the exercise of a power of advancement among children could not create a forfeiture. But here the plaintiff has come to the Court and asked for the money to be raised under the powers of the Trustee Act, 1925, for his own benefit, and thereby deprived himself of income, whether he pays the premiums on the policy himself or whether the trustees pay them.

The decision in *In re Brewer's Settlement* (1) does not apply to the present case. In *In re Loftus-Otway* (2) Stirling J. held that the commission of an act of bankruptcy holding up income in the hands of trustees created a forfeiture, although the bankruptcy petition was afterwards dismissed. That was a converse case to *In re Mair* (3), and is in my favour. In *In re Mair* (3) the act which would have created a forfeiture was recalled before the forfeiture could take place. In *In re Baker* (4) it was held that a forfeiture had occurred although the mortgagees released their charges before anything became payable to the beneficiary.

I submit that the tenant for life has done an act whereby part of the capital, and therefore part of his income, has gone for ever.

On the strictest principles of interpretation he is within the words of the clause and therefore has incurred a forfeiture.

H. F. Parshall for the wife of the plaintiff supported the plaintiff's contention.

C. V. Rawlence for the trustees of the settlement.

Fergus D. Morton K.C. in reply. No act has yet taken place whereby any part of the income has been or may be diverted from the tenant for life.

In *In re Stimpson's Trusts* (5) the report does not give the grounds for the decision of Luxmoore J. on the question whether or not there was a forfeiture, but there it may be explained by the language of the will, which was quite different to the will in the present case. In *In re Loftus-Otway* (2) practically

(1) [1896] 2 Ch. 503.
(2) [1895] 2 Ch. 235.
(3) [1909] 2 Ch. 280.
(4) [1904] 1 Ch. 157.
(5) [1931] 2 Ch. 77.

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the whole of the judgment of Stirling J. turned on the words "be liable to be deprived." That case stands quite by itself. If the words there had simply been "be deprived" it is probable that the decision would have been against forfeiture. *In re Baker* (1) is no authority in the present case, as there money was actually borrowed by the tenant for life on mortgage of his interest.

If the tenant for life takes out a policy on his own life and pays the premiums himself out of income already received by him there can be no forfeiture.

It cannot be said that the trustees have money in their hands part of the plaintiff's income which not only they must not pay to the plaintiff but they must pay to some one else—namely, the insurance company. It does not even follow that the plaintiff will pay the premiums out of this income, as he has a separate voluntary allowance of 1000*l.* a year.

[EVE J. The trustees under the order must retain 450*l.* before the date of renewal in case the plaintiff does not pay the premiums.]

[The following cases were also referred to : *In re Laye* (2) ; *In re Forder.* (3)]

Cur. adv. vult.

April 15. EVE J. By her will dated July 25, 1917, as varied by a codicil thereto dated July 21, 1923, the late Millicent Emily Salting bequeathed to her trustees two sums, amounting in all to 150,000*l.*, upon trust to invest the same as therein mentioned, and, in the events which have happened, to pay the income thereof to the plaintiff until he should assign, charge, or otherwise execute, do or suffer some deed, act or thing voluntary or involuntary (other than giving his consent to the exercise of the power of advancement in favour of his children in the said will contained), whereby the said income or some part thereof would, if belonging absolutely to him, become payable to any other person or corporation, or until he should die, And if the last preceding trust should come to an end in the lifetime of the plaintiff, then upon trust during

(1) [1904] 1 Ch. 157. (2) [1913] 1 Ch. 298.
(3) [1927] 2 Ch. 291.

the remainder of his life to pay or apply the said income for the maintenance and support or otherwise for the benefit of all or such one or more exclusively of the others or other of the following persons—namely, the plaintiff himself, his wife for the time being (if any) and his children or remoter issue (if any), or if there should be no wife or issue in existence for the time being, then the plaintiff himself, and his brothers, sisters, nephews and nieces for the time being in existence in such manner in all respects as the trustees should in their absolute and unfettered discretion think fit.

Circumstances have arisen in which the plaintiff was constrained to apply to the Court for authority to the trustees to raise a sum of 15,000*l.* out of the capital of the trust legacy, and to apply the same in the discharge of the plaintiff's debts and otherwise for his benefit upon his effecting and assigning to the trustees a policy of assurance to secure a like sum at his death, the policy and all the moneys to be received in respect thereof to be held by the trustees upon the trusts as far as applicable from time to time affecting the capital of the trust legacy.

Accordingly, by an order dated March 7, 1932, as corrected under Order XXVIII., r. 11, on April 12, 1932, the judge being of opinion that the transaction thereby authorized was expedient within the meaning of s. 57 of the Trustee Act, 1925, it was ordered that the trustees should out of the capital of the said trust legacy raise the sum of 15,000*l.*, and pay and apply the same as therein mentioned, and that the plaintiff should forthwith effect the policy of assurance therein referred to, and assign the same and the benefit thereof to the trustees, and that the trustees should stand possessed of the policy and of all moneys to be received in respect thereof upon the trusts so far as applicable from time to time affecting the capital of the trust legacy, and that the trustees should pay the premiums on the said policy other than the first premium (which had already been paid out of capital) out of the dividends and interest arising out of the said trust legacy, unless the plaintiff should within seven days after each renewal date produce to the trustees a receipt

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for the amount of the premium. The question is whether, upon the true construction of the will and codicil and in the events which have happened—namely, the making of the order of March 7, 1932, the plaintiff's interests thereunder have been determined ?

It is conceded that no forfeiture arises under that part of the order which authorizes the payment of capital moneys to or for the benefit of the plaintiff. It is true, of course, that he will cease to enjoy the income of so much of the capital as is expended in this way, but to what other person would it have become payable had it belonged to him absolutely ? The tenant for life, by borrowing the money and paying it away to his creditors, does not make the income payable to any one else ; his action did not amount to an alienation of the income. This point is concluded in the plaintiff's favour by the judgment in *In re Brewer's Settlement.* (1) Chitty J., as he then was, puts the plaintiff's case in one sentence at the top of p. 507, where he says : " I think that it would be an extravagant refinement to say that every sovereign as he paid it away still remained part of the trust fund and was producing an income, and that such income was payable to . . . . the persons who had received the sovereign or other the money thus paid away." But it is contended that a forfeiture is brought about by that part of the order which authorizes the trustees in certain circumstances to keep down the second and subsequent premiums on the policy out of the income arising from the trust legacy. I cannot accept the view put forward on behalf of the plaintiff that the effect of an order under s. 57 is to introduce the terms of the order into the settlement and read the same as if the order were in terms set out in the settlement. No doubt, the making of such an order may, and often does, qualify the management and administration of the settled property; but in exercising the jurisdiction, the Court must be cautious not to extend the operation of the order beyond what is reasonably necessary for the particular transaction, and in determining, as I have to do here, the

(1) [1896] 2 Ch. 503, 507.

construction of an order made under s. 57, it is, I think, obvious that I must apply the same rules as would be applicable if the transaction had been the subject-matter of a binding agreement outside s. 57 altogether. In both cases it is impossible to disregard the fact that the settlor has incorporated in the settlement a clause of defeasance to come into effect, amongst other things, if the plaintiff does any voluntary act—with one specified exception—whereby any part of the income would, if belonging absolutely to him, become payable to any other person or corporation.

I come back then to the simple question—does the concluding part of the order operate to work a forfeiture of the plaintiff's life interest? I do not think it does. The plaintiff may thereby be temporarily deprived of the enjoyment of part of the income; but I cannot hold that he thereby does an act whereby any part of the income becomes, or will become, payable to any other person or corporation. It is true that if he neglects to do something more, that is to say, to pay the future premiums and to produce the receipts within the seven days, he will have suffered—voluntarily or involuntarily—something by which the income will actually become payable to others, and in that event a forfeiture will, in my opinion, be incurred; but so long as he pays the premiums and the trustees are not called upon to apply any part of the settled income in so doing, I do not think his life interest will be affected.

It will be incumbent on the trustees each year, in anticipation of the date on which the renewal premium is payable, to retain in hand a sufficient part of the trust income to pay such premium, and they must not pay over the same to the plaintiff until satisfied that the premium has, in fact, been paid.

The costs of all parties as between solicitor and client will be retained and paid out of the capital sum to be raised under the order.

Solicitors: *Withers & Co.; Flower & Nussey.*

H. L. L.

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April 25; *May* 9.

In re CONTAL RADIO, LIMITED.

[No. 00337 of 1932.]

Company—Winding-up—Petition—Scheme of Arrangement—Composition with Creditors—Deed of Arrangement executed—"Arrangement"—"About to be wound up"—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 191—*Companies Act*, 1929 (19 *& 20 Geo.* 5, *c.* 23), *s.* 153; *s.* 191, *sub-s.* 1, *para.* (*e*); *ss.* 246, 251.

By s. 246 of the Companies Act, 1929: "The provisions contained in the nine sections of this Act next following shall apply to every voluntary winding up whether a members' or a creditors' winding up."

By s. 251, sub-s. 1: "Any arrangement entered into between a company about to be, or in the course of being, wound up and its creditors shall, subject to the right of appeal under this section, be binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors":—

Held, (i.) that s. 251, sub-s. 1, applies only to an arrangement entered into during a voluntary winding-up or shortly before the passing of a resolution for a voluntary winding-up:

(ii.) that a composition by a company with its creditors, intended to make the company solvent and therefore to prevent a voluntary winding-up, is not an "arrangement" within the meaning of the section.

Quaere, whether the word "arrangement" in the section is intended to include a compromise.

PETITION.

Contal Radio, Ld. (hereinafter called "the company"), was registered on July 23, 1925, with a nominal capital of 1000*l.*, divided into 1000 shares of 1*l.* each. There were only two shareholders, the managing director, who held 990 shares, and his wife, who held ten. On October 6, 1928, the company issued a debenture for 500*l.*, and on January 19, 1932, a further debenture for 500*l.*

On February 4, 1932, a creditor issued a writ against the company for 205*l.* 19*s.* At that date the amount owing by the company to creditors was 8006*l.*, and the value of the company's assets was 3165*l.* Of the amount owing, 1150*l.* 11*s.* 9*d.* was due to Telsen Electric Company, Ld. (hereinafter called "the petitioner").

At a meeting of creditors held on February 17, 1932, a scheme was put forward under which it was proposed that the

company should enter into a deed of arrangement with trustees for the creditors to pay to them a sum sufficient to provide payment of a composition of five shillings in the pound payable by agreed instalments, that the final payment should be secured by the deposit with the trustees of the second of the two debentures for 500*l.* in the company, and that the company should undertake not to increase its debenture issue until the final payment had been made. The managing director consented, at the meeting, to guarantee payment of the composition. On February 22, 1932, a committee of creditors appointed to consider the scheme met and decided to recommend the scheme to the general body of creditors. On March 3, 1932, there was a general meeting of the company, and on March 8 the petitioner served on the company notice to pay the debt of 1150*l.* 11*s.* 9*d.*

Assents to the scheme were given by "three-fourths in number and value of the creditors," as required by s. 251, sub-s. 1, of the Companies Act, 1929. A deed of arrangement, executed by the managing director and by a trustee for the creditors and sealed by the company, was completed on March 15, and the second of the two debentures for 500*l.* was deposited with the company's solicitor, who sent to the trustee for the creditors a cheque for 1000*l.* from the company to cover the first instalment of the composition. No creditor or contributory appealed to the Court against the arrangement under s. 251, sub-s. 2, of the Companies Act, 1929.

By this petition the petitioner, who had not assented to the scheme, asked that an order might be made for the compulsory winding-up of the company.

Roger Turnbull for the petitioner. The fact that the assents requisite under s. 251, sub-s. 1, of the Companies Act, 1929, were given does not make the arrangement valid and binding, for that section does not apply to the present case. It applies only to a company "about to be, or in the course of being, wound up," which was not the position of the company at the date when the arrangement was completed. Moreover, the section is one of a group of sections expressly stated by

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s. 246 of the Act to apply "to every voluntary winding up . . . ." There is no voluntary winding-up in the present case. It is submitted that the company is insolvent and unable to pay its debts, and that the Court ought therefore, on this petition, to make an order for its compulsory winding-up.

H. S. G. Buckmaster for the company. As there has been no appeal against the arrangement under s. 251, sub-s. 2, of the Act, the arrangement is valid and binding on the company and on all its creditors. Sub-s. 1 of the section replaces s. 191, sub-s. 1, of the Companies (Consolidation) Act, 1908, in which the phrase used is "about to be wound up voluntarily." At the date of the writ for 205*l.* 19*s.* the company could not have defended an action by the creditor to whom that amount was owing. That creditor could, therefore, have presented a petition to wind up, and the company would have been compelled either to go into liquidation or to submit to an order of the Court. Therefore, at the date of the completion of the arrangement, the company was "about to be wound up" within the meaning of s. 251, sub-s. 1, of the Companies Act, 1929. That section therefore applies, and accordingly the arrangement is valid and binding on the company and on all its creditors.

MAUGHAM J. This petition raises a question, which has not hitherto been submitted to the Court, as to the true construction of s. 251 of the Companies Act, 1929. That section replaces s. 191 of the Companies (Consolidation) Act, 1908, which in its turn replaced ss. 136 and 137 of the Companies Act, 1862. The section thus has a long history, but, for reasons which will become clear in what I shall say, has never been construed in any case before the Court. It now appears in a series of nine sections which, by s. 246 of the Act, are stated to ". . . . apply to every voluntary winding up . . . ." That, no doubt, is the reason why the word "voluntarily" was not inserted in the section, in re-enacting s. 191 of the Companies (Consolidation) Act, 1908, after the words "wound up," but it is clear that the section applies

to "every voluntary winding up," and is not applicable to cases of a compulsory winding-up.

A number of difficulties arise as to the true meaning of the section. First, what does "arrangement" mean? The phrase used in s. 153, sub-s. 1, is "compromise or arrangement." That sub-section is as follows: "Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs." The same phrase is used also in s. 191, sub-s. 1, para. (*e*), which gives power to the liquidator of a company in a winding-up by the Court to make any "compromise or arrangement" with creditors or persons claiming to be creditors or having or alleging themselves to have any claim against the company. It seems prima facie that "arrangement" in s. 251 was not intended to include a compromise, properly so-called, for the word "compromise" is deliberately omitted.

Next arises the question, when can a company be said to be "about to be wound up"? My view is that the section is primarily applicable, as are the eight sections following s. 237, to every voluntary winding-up, and is not applicable if there is no voluntary winding-up. Sect. 237 provides as follows: "The provisions contained in the eight sections of this Act next following shall apply in relation to a creditors' voluntary winding up." The reference in s. 191, sub-s. 1, of the Companies (Consolidation) Act, 1908, and in s. 251 of the Companies Act, 1929, to "a company about to be . . . . wound up," was necessary, because it might be that the arrangement was entered into before the passing of the special resolution or extraordinary resolution for voluntary winding-up. I must come to the conclusion that a composition by a company with its creditors, as a result of which the company will be

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solvent, is not an arrangement by a company about to be wound up within the meaning of s. 251 of the Companies Act, 1929. I may add that the section presents a certain number of practical difficulties. It says nothing about, and makes no provision for, a meeting of creditors, and "creditors" must taken to include secured as well as preferential creditors, though there is no provision for a valuation of securities. The Legislature seems to have thought that three-fourths in number and value of the creditors secured and unsecured ought to be able to bind a minority of them who may never even have heard of the proposed arrangement. The Court, if applied to within three weeks according to sub-s. 2 of the section, has power only to "amend, vary, or confirm the arrangement": the draftsman seems to have left out any words showing that the Court may set it aside, though by sub-s. 1 the arrangement is "... subject to any right of appeal under this section ..." Nor is it easy to construe the words "the completion of the arrangement."

In my opinion, the section does not apply to the present case. The so-called "arrangement" is therefore, in my view, not valid or binding on the company's creditors, and the petitioner is entitled to present the petition as an unsecured creditor. But it is clear that a large majority of the creditors do not wish that the company should be wound up, but prefer an arrangement under which a large shareholder will guarantee the composition. I think that I am bound to have regard to those creditors' wishes, and that I ought not to disregard them just because a mistake has been made as to the circumstances under which a majority can bind a minority. An opportunity ought to be given to the creditors to pass a scheme of arrangement, if they can do so, under s. 153 of the Act; and the proper course is to let the petition stand over for a period which will enable that to be done. If a scheme is not passed, a compulsory order will be made upon the petition.

[It was ordered that the petition should stand over for a fortnight to enable the creditors to pass a scheme of arrangement.]

May 9. The petition again came before the Court and it was stated that a summons had been taken out for leave to convene a meeting of creditors under s. 153 of the Companies Act, 1929. The petition was then adjourned until the first petition day of the following sittings, to enable the creditors to consider a proposed scheme under that section.

Solicitors: *Cochrane & Cripwell; G. Edmund Hodgkinson.*

K. R. A. H.

In re WILLIAM C. LEITCH BROTHERS, LIMITED.

[005 of 1930.]

Company—Winding-up—Fraud by Director—Liability of Director—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 13—*Bankruptcy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 1, *sub-s.* 1, *para.* (*g*); *s.* 44—*Companies Act*, 1929 (19 & 20 *Geo.* 5, *c.* 23), *ss.* 265, 275, *sub-ss.* 1, 2, 6; *s.* 276, *sub-s.* 3.

By s. 275, sub-s. 1, of the Companies Act, 1929: "If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court, on the application of the official receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any of the directors, whether past or present, of the company who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct."

By sub-s. 6: ". . . . where the declaration under subsection (1) of this section is made in the case of a winding up in England, the declaration shall be deemed to be a final judgment within the meaning of paragraph (*g*) of subsection (1) of section one of the Bankruptcy Act, 1914."

Held, (i.) that the declaration of liability should state the amount for which the director is liable;

(ii.) that a company carrying on business and incurring debts when to the knowledge of the directors there is no reasonable prospect of the debts being paid may, in general, be properly inferred to be carrying on business "with intent to defraud creditors" within the meaning of sub-s. 1.

Semble, s. 275 is a punitive provision, and the Court, on making a declaration in the winding-up of a company that a director is personally responsible for all or any of the debts or other liabilities of the company, may in its discretion make an order not limiting his liability to the amount of the debts due to creditors held to be defrauded within the meaning of the section.

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SUMMONS IN THE WINDING-UP.

By this summons the liquidator of William C. Leitch Brothers, Ld. (hereinafter called "the company"), asked for declarations that William Cleghorn Leitch, governing director of the company (hereinafter called "the respondent"), having been knowingly a party to carrying on the business of the company with intent to defraud its creditors, was personally liable for all the company's debts and was liable also to contribute to the company's assets specified sums as compensation for specified acts of misfeasance.

The company was incorporated on December 19, 1926, to acquire the respondent's business of a perambulator and furniture manufacturer and merchant at four addresses in Manchester. The agreement for the sale of the business to the company, dated January 13, 1927, provided that in consideration of the sale the company should pay the respondent 5000*l.*, to be satisfied by the allotment to him or his nominees of 1000 fully paid 1*l.* ordinary shares in the capital of the company and by the issue to him of a debenture for 4000*l.*, bearing interest at 6 per cent. per annum, secured by a charge on all the property of the company, both present and future, including uncalled capital, and should take over the debts and liabilities of the respondent's business, amounting to 769*l.* 11*s.* 4*d.* The company's articles of association provided that the respondent should be the first governing director of the company, with power to fix his own remuneration and to appoint other directors.

The company issued the debenture to the respondent on January 15, 1927. A balance-sheet made up from the respondent's books showed the alleged value of the assets of the respondent's business sold to the company as being, as at September 30, 1926, 3964*l.* 2*s.* 1*d.*, excluding goodwill, which was not entered in the books. After the sale of the business to the company, some of the premises remained vested in the respondent. The directors of the company, the respondent and his brother, after the formation of the company, appointed the respondent managing director at a salary of 1000*l.* a year, and the company was debited with

1000*l.* as his salary from September 30, 1926, to March 31, 1927, the first six months of the company's existence, being 500*l.* more than the amount due to him in respect of that period. During those six months the company, after the 1000*l.* had been credited to the respondent, made a net loss of 2550*l.* 14*s.* 9*d.* For the year ending March 31, 1928, the company made a profit of 677*l.*, for the following year a loss of 215*l.*, and from March 31, 1929, to May 9, 1930, a loss of 1057*l.* The respondent and his brother, as directors, purported to pay 21*l.* 2*s.* as dividend from January 15, 1927, to March 1, 1928, to a preference shareholder, and 250*l.* 8*s.* as dividend for the year ending March 31, 1928, upon ordinary shares which had been allotted to themselves.

Towards the end of 1929 the company was in financial difficulties which by March, 1930, had become so serious that the company was unable to pay its debts as they became due. By March 1, 1930, the company to the knowledge of the respondent owed about 6500*l.* for goods which had been supplied to it and had no means of paying these debts. The respondent ordered goods to an amount of about 6000*l.* after that date, which goods became subject to the charge contained in the debenture held by the respondent. On June 20, 1929, the respondent lent to the company 600*l.*, of which 100*l.* was repaid on December 6, 1929, 100*l.* on January 2, 1930, 150*l.* on March 10, 1930, and 150*l.* on April 1, 1930. Between April 5 and May 5, 1930, seven writs were issued by creditors of the company. On May 9, 1930, the respondent, as debenture holder, appointed a receiver on the ground that interest on the debenture had not been paid, and the receiver appointed the respondent manager of the business. The respondent removed from the shops which he managed for the receiver 260*l.* worth of goods to a shop which he had opened in Glasgow in his wife's name and, also as manager for the receiver, collected debts due to the company to the amount of 1300*l.* He kept the sums of money which he so collected on account of interest due to him under the debenture, and later gave receipts for them to the receiver, who dismissed him from the position of manager.

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The company had with the Midland Bank, Ld., an account which, on April 4, 1930, was overdrawn to the amount of 800*l.* 10*s.* The amount to which the bank had originally allowed the overdraft, on a guarantee by the respondent, was 600*l.* The overdraft had, however, increased, and was secured by the respondent's guarantee and by his depositing title deeds with the bank. Between April 10 and June 5, 1930, 684*l.* 6*s.* 8*d.* of the overdraft was paid off. From the beginning of January, 1930, to the end of May, 1930, the respondent ordered goods greatly in excess of what was required for the company's business and of what had generally been ordered for the company over a like period.

On June 5, 1930, a resolution for the compulsory winding-up of the company was passed by a statutory meeting of creditors, and an order for its compulsory winding-up was made on June 23, 1930. By this summons, taken out on March 5, 1931, the liquidator asked for a declaration that the respondent, having been knowingly a party to carrying on the company's business with intent to defraud creditors, was personally liable for all of the company's debts or other liabilities, without any limitation of liability, and that his liability might be made a charge on his debenture, on the ground that the debenture and the ordering of goods for which the company could not pay constituted fraud on the company's creditors. He asked also for declarations that the respondent was liable to contribute to the company's assets 500*l.* as compensation for misfeasance in accepting for remuneration during the first six months of the company's existence 1000*l.* instead of 500*l.*, to which alone he was entitled; 21*l.* 2*s.* and 250*l.* 8*s.* as compensation for misfeasance in paying those sums as dividends out of the company's capital; 300*l.* as compensation for misfeasance in fraudulently preferring himself by repaying to himself 150*l.* on March 10, 1930, and 150*l.* on April 1, 1930, after the company had become unable to pay its debts as they became due; and 684*l.* 6*s.* 8*d.* as compensation for misfeasance in fraudulently preferring himself and the Midland Bank, Ld., by paying off the company's overdraft at that bank, which he had guaranteed, when the company had

become unable to pay its debts as they became due; lastly, he asked that the respondent might be ordered to pay to the liquidator, within four days of the service on the respondent of the order to be made on the summons, the sums of 500*l.*, 271*l.* 10*s.*, 300*l.* and 684*l.* 6*s.* 8*d.*, with interest at 5 per cent. per annum from the dates on which the respective acts of misfeasance were committed. At the hearing the claim for 271*l.* 10*s.* paid as dividend was admitted to be in excess of the sum paid out of the assets of the company, and the amount then claimed was 154*l.* The claim alleging that the respondent had been knowingly a party to carrying on the company's business with intent to defraud creditors was made under s. 275, sub-s. 1, of the Companies Act, 1929.

Cyril Atkinson K.C. and *John Bennett* for the liquidator. The object of s. 275 of the Companies Act, 1929, is beyond question. It is intended not only to help creditors of a company who have been defrauded, but also to be applied as a punitive provision against a fraudulent company and fraudulent directors. It ought to be so applied in the present case, in which the respondent formed the company and created a debenture for 4000*l.* in favour of himself, in circumstances in which the company had, for practical purposes, no assets whatever. A person who orders goods on a company's behalf when there is no possibility of the company's paying for the goods in bulk is carrying on business with intent to defraud the company's creditors. There is in s. 13 of the Debtors Act, 1869, some indication of what "fraud" means. (1) On the words "by means of any other

(1) Sect. 13: "Any person shall in each of the cases following be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year, with or without hard labour; that is to say

(1.) If in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud:

(2.) If he has with intent to defraud his creditors, or any of them, made or caused to be made any gift, delivery, or transfer of or any charge on his property:

(3.) If he has, with intent to defraud his creditors, concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him."

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fraud" it has been held in *Rex* v. *Thompson* (1) that the authorities establish that a person obtaining goods and never intending to pay for them is guilty of fraud other than false pretences. It is submitted that in the present case the Court ought to find that the company, and particularly the respondent, had no intention of paying for goods which had been ordered after March 1, 1930, on the company's behalf, because from that date the respondent knew that the company could not pay for them. The definition of insolvency is "inability to pay debts in the ordinary course of business."

[They referred to *Rex* v. *Brownlow*. (2)]

J. Lustgarten for the respondent. There is no special definition of "fraud," but an essential to fraud is the intention not to pay. There can be no fraud in ordering goods in the course of business unless there is an intention not to pay for them. The inability to pay for them is not enough by itself to make such a transaction fraudulent. *Rex* v. *Brownlow* (2) is not applicable. The respondent ordered the goods on behalf of the company and the intention was to resell them. The liquidator is making his claim for the benefit of his common fund. He is a paid officer, and his remuneration depends on the amount which he realizes. Sect. 275 of the Companies Act, 1929, is certainly not intended to be applied to inflict penalties on fraudulent companies and directors. In the present case, although it is not the whole body of creditors that has been defrauded, it is for the common fund, which is for the benefit of the whole body of creditors, that the claim is being made.

Cyril Atkinson K.C. in reply. The present case has every feature requisite in cases of fraudulent preference within s. 44 of the Bankruptcy Act, 1914, and is therefore a fraudulent preference of creditors of the company within the Companies Act, 1929, s. 265. There is obvious insolvency, obvious inability to pay debts as and when they become due.

[He referred to *In re Cohen* (3) and *In re G. Stanley & Co.* (4)]

(1) (1910) 5 C. App. R. 9, 12.
(2) (1910) 26 Times L. R. 345.
(3) [1924] 2 Ch. 515.
(4) [1925] Ch. 148.

MAUGHAM J. [after stating the facts :] The conclusion of fact to which I am bound to come is that, at any rate from March 1, 1930, the company was carrying on business with intent to defraud creditors, to the knowledge and, indeed, under the direction of the respondent.

That leads me to the question of the true construction of s. 275 of the Companies Act, 1929, a question of great difficulty. In my opinion I must hold with regard to the meaning of the phrase carrying on business "with intent to defraud creditors" that, if a company continues to carry on business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment of those debts, it is, in general, a proper inference that the company is carrying on business with intent to defraud: and, as I have intimated, I am satisfied that the respondent knew what the position was as from March 1, 1930; and I hold further that the respondent deliberately went on trading in the name of the company in order, as he hoped, to safeguard his own position, and without any regard to the interests of the creditors. Then arises the question, what is the result of that finding under s. 275 of the Companies Act, 1929? Sub-s. 1 provides: [His Lordship read the sub-section and continued :] That seems to leave the declaration, so far as the amount is concerned, simply a matter of discretion for the Court: but if the declaration is made in reference to a fixed amount, is that amount to be apportioned among the creditors who have been defrauded, or does it go to swell the general assets available in the liquidation? A number of other difficulties arise on the construction of the section which I shall not stay to enumerate, because they are mentioned in Buckley on the Companies Acts, 11th ed., pp. 564–565, *nn.* I must, however, decide at the present time at least one question on the construction of the section—namely, whether the declaration of the Court must be in respect of a particular sum or may be in general terms. A declaration that the director in question is personally liable for all the debts of the company after, e.g., March 1, 1930, would be almost useless in the case of

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an ordinary liquidation, because it is ordinarily impossible, except at a late stage of the liquidation, to state who are the creditors to whom the debts are due, and what are the amounts due to them. It will be noted that the debts are not proved on the hearing of the originating summons, and in many cases (without saying that it is so in every case) it is exceedingly difficult for the Court to ascertain, on the hearing of the summons, who are the creditors of the company who have been defrauded within the meaning of the section. Further than that, it seems to me that s. 275, sub-s. 6, requires the declaration to be in relation to a definite amount, since it provides that "... where the declaration ... is made in the case of a winding up in England, the declaration shall be deemed to be a final judgment within the meaning of paragraph (*g*) of subsection (1) of section one of the Bankruptcy Act, 1914." Those words agree closely with the words of s. 276, sub-s. 3, of the Act, where I find the sentence: "Where in the case of a winding up in England an order for payment of money is made under this section, the order shall be deemed to be a final judgment within the meaning of paragraph (*g*) of subsection (1) of section one of the Bankruptcy Act, 1914." The opening words of sub-s. 1 of s. 1 of the Bankruptcy Act, 1914, are: "A debtor commits an act of bankruptcy in each of the following cases:—" and by para. (*g*) of that sub-section, a debtor commits an act of bankruptcy "If a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the court, elsewhere, a bankruptcy notice under this Act, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was

obtained, or the proceedings in which the order was obtained: . . . . ." That clearly contemplates a judgment or an order for an ascertained sum, and, to my mind, the Legislature, under s. 275, must be contemplating also that there shall be a declaration against the guilty director for a definite amount. I do not think that it is open to me now to decide whether the amount of so many pounds, if recovered from the respondent, must be distributed by the liquidator among the creditors who have been defrauded, or whether it goes into the general assets in the liquidation: but, as I have indicated, I must, I think, fix an amount for which, under the declaration, the respondent is personally liable. Sect. 275, sub-s. 2, of the Companies Act, 1929, is as follows: "Where the court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration, and in particular may make provision for making the liability of any such director under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any company or person on his behalf, or any person claiming as assignee from or through the director, company or person, and may from time to time make such further order as may be necessary for the purpose of enforcing any charge imposed under this subsection. For the purpose of this subsection, the expression 'assignee' includes any person to whom or in whose favour, by the directions of the director, the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration (not including consideration by way of marriage) given in good faith and without notice of any of the matters on the ground of which the declaration is made." That is an elaborate provision, and the definition of "assignee" is curious. I am inclined to the view that s. 275 is in the nature of a punitive provision, and that where the Court makes such a declaration in relation to "all or any of the debts or other liabilities of the company," it is in the discretion of the Court

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to make an order without limiting the order to the amount of the debts of those creditors proved to have been defrauded by the acts of the director in question, though no doubt the order would in general be so limited. On the whole, in the circumstances of the present case, I think that I shall be doing justice by making a declaration that the respondent is personally liable (without any limitation of liability) in respect of the sum of 6000*l.*, being a part of the debts or other liabilities of the company, and I shall leave it to some further application to determine the persons who are to have the benefit of anything that may be recovered as a result of that declaration. I shall also make a declaration that the respondent's liability as a director under that declaration is to be a charge upon the debenture which, I understand, is still held by him.

[His Lordship then proceeded to deal with the claims for misfeasance, and made an order that the respondent should pay to the liquidator 260*l.*, the amount of the goods which he removed while acting as manager for the receiver, 1300*l.*, the amount which he received while acting as manager for the receiver, and the sums of 500*l.*, 300*l.*, 684*l.* 6*s.* 8*d.*, and 154*l.*, with interest as claimed by the summons.]

Solicitors: *Bernard Kuit & Co., Manchester; Harry Finklestone, Manchester.*

K. R. A. H.

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Jan. 11, 12, 13; *March* 23.

[1930. E. 1043.]

Conversion—Timber excepted from Sale of Land and sold to another Purchaser—Condition of Removal before a certain Date—Non-compliance—Refusal by Purchaser of Land to permit Removal—Assessment of agreed Damages for Conversion — Unsatisfied Judgment — Subsequent attempted Sale to Defendants as new Purchasers—Property not divested by Judgment.

In 1925, a certain piece of land, known as B. Lodge, was sold to J. N. and M. N. In the conveyance a quantity of timber trees, saplings, etc., was excepted out of the sale by the vendors, who reserved to themselves the right to cut and remove them before October 11, 1927. In 1926 the plaintiff purchased the timber trees, etc., and proceeded to cut and remove them. A large amount of the cut timber was, however, left on the land after October 11, 1927, and in these circumstances J. N. and M. N. stated that the plaintiff had lost his title thereto and forfeited his right to remove it, and they claimed it as their property.

As the result of an action in 1930 against J. N. and M. N. it was held that the property in the timber remained in the plaintiff after October 11, 1927, and a certain sum by way of damages for conversion against J. N. and M. N. was at the instance of the judge agreed between all parties to the proceedings and awarded the plaintiff. In the meanwhile J. N. and M. N. purported to sell the cut timber to the present defendants.

The plaintiff—who had taken no steps to enforce the order which he had obtained against J. N. and M. N.—gave notice on June 10, 1930, to the defendants that the sale by J. N. and M. N. to them was ineffective, as J. N. and M. N. had no title to the timber, and requesting the return of the timber to him. The defendants having refused and repudiated liability, the plaintiff commenced an action, and by his statement of claim asked for a sum by way of damages for conversion; the conversion relied on being the refusal by the defendant company to return the timber in compliance with the notice of June 10, 1930:—

Held, that whether a judgment in trover was in the alternative form or was merely one for the value of the goods or for damages for their conversion, it did not by itself and apart from special circumstances divest the owner of the property of his title thereto unless and until the judgment was fully satisfied. No special circumstances existed sufficient to constitute any confirmation by the plaintiff of any title to the timber in J. N. or M. N., nor did the plaintiff by accepting judgment in the form he did against J. N. and M. N. confer any title on them or the defendant company by estoppel. The plaintiff was therefore entitled to a certain sum for damages which had been agreed on for conversion against the defendant company.

ACTION.

By a conveyance dated September 29, 1925, a certain piece of land about ten acres in extent called Brick Yard

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Shaw Lodge situate in the parish of Westfield in the county of Sussex and forming part of an estate known as the Coghurst Estate was conveyed by one Manaton Courtenay Lord, the then owner of the estate, and his mortgagee Hugh W. Reeves to one Joseph Noakes and his sister Mary V. Noakes in fee simple as tenants in common in equal shares. The conveyance contained a reservation of all timber and timberlike trees in the following terms: "There are excepted out of the hereditaments hereinbefore described and there are reserved unto the mortgagee and the vendor respectively and their respective heirs and assigns (*a*) All timber timberlike and other trees tellers saplings poles and underwood either cut or growing on the property hereby conveyed ('hereinafter referred to as the said timber') with full right and liberty for the mortgagee and the vendor respectively and their respective heirs and assigns or other the owner or owners for the time being of the said timber and his and their servants and licensees to enter upon the hereditaments hereby assured or any part thereof at all times up to the 11th day of October 1927 with or without carts . . . . and to fell and remove in a proper and usual manner the said timber including all faggots and debris by such routes over the hereditaments hereby assured as may be agreed upon by the owner or owners of the said timber his or their heirs and assigns and the purchasers and in default of agreement as may be determined by an umpire to be appointed by them."

By a conveyance dated December 31, 1925, the original owner Manaton C. Lord and his mortgagee conveyed to a company called Coghurst Estates, Ld., among other properties and things, the timber, timberlike and other trees excepted out of the conveyance of Brick Yard Shaw Lodge.

On April 1, 1926, Coghurst Estates, Ld., sold the above mentioned excepted timber and trees to the plaintiff George Ellis, who caused them to be felled and sawn into planks. Some of the timber and trees so felled and the planks so sawn were removed by the plaintiff from Brick Yard Shaw Lodge before October 11, 1927, the date referred to in the conveyance dated September 29, 1925, reserving the timber,

and before which the timber and trees were to be removed. A considerable quantity of the felled timber, sawn planks, and the tops and cordwood resulting from the plaintiff, Ellis's, operations, however, remained on the land Brick Yard Shaw Lodge after October 11, 1927. This delay in removal was attributed by the plaintiff to the interference of J. Noakes and his sister, Miss M. V. Noakes. In these circumstances J. Noakes and Miss M. V. Noakes claimed that the plaintiff had forfeited his interest in the timber, planks, tops and cordwood so left on the land and had lost his right to take them away by reason of his not having removed them before October 11, 1927. They therefore claimed them all as their property and refused to allow their removal.

As the result of this refusal the plaintiff Ellis on June 1, 1928, issued a writ in the Chancery Division against J. Noakes and Miss M. V. Noakes claiming a declaration that the timber in question which he had bought and not removed before October 11, 1927, was his property, and an injunction restraining the defendants J. Noakes and Miss M. V. Noakes, their workmen, servants and agents from removing, selling or otherwise disposing of or interfering with or damaging the said timber or any part thereof, and from preventing the plaintiff from removing the said timber or interfering with his so doing. He also claimed damages. The action was intituled *Ellis* v. *Noakes*, 1928. E. 744, and was tried by Clauson J., who on January 20, 1930, gave judgment for the defendants J. Noakes and Miss M. V. Noakes. There was an appeal by the plaintiff from this judgment, and on April 9, 1930, the Court of Appeal reversed the decision of the learned judge, and held that the property in the timber remained vested in the plaintiff, although he had not removed it before October 11, 1927, and they gave judgment for the plaintiff for 250*l.* for conversion of the timber by the defendants J. Noakes and Miss M. V. Noakes. (1)

After the writ in the action *Ellis* v. *Noakes* had been issued but before the action came on for trial, the defendants

(1) See note of judgment of the Court of Appeal in this case at end of this report.

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J. Noakes and Miss M. V. Noakes in October, 1928, purported to sell the timber, planks, etc., with some trifling exceptions, to the defendants in the present proceedings, John Stenning & Son, Ld., for the sum of 200*l.* These defendants thereupon proceeded to remove the timber, etc., from the land.

The plaintiff had not taken any steps to enforce the order of the Court of Appeal against J. Noakes and Miss M. V. Noakes, as in his view these two defendants had no means of satisfying the judgment, either wholly or in part.

The plaintiff, through his solicitors, informed the defendants John Stenning & Son, Ld., on June 10, 1930, that he considered the sale to them by J. Noakes and Miss M. V. Noakes was ineffective, as in his opinion the vendors had no title to the timber, planks, etc., and he asked for their return or the payment of their value. The defendants having repudiated liability, an action was instituted on June 28, 1930. By his statement of claim the plaintiff claimed a sum for damages for conversion.

The defendants in their defence stated that as the plaintiff had not removed the timber, planks, etc., before October 11, 1927, he had by reason of such non-removal lost all property and interest therein after that date, and that the same therefore belonged to and were the property of J. Noakes and Miss M. V. Noakes after October 11, 1927. They further stated that at the time of the purchase and removal by them of the timber, planks, etc., they had received no notice whatever of any claim by the plaintiff, and also that the plaintiff having known of the purchase and having stood by and allowed them to remove the timber, planks, etc., was estopped from disputing their right of removal. They also claimed that the judgment obtained by the plaintiff in the action of *Ellis* v. *Noakes* for 250*l.* for damages was a bar to the present proceedings.

H. B. Vaisey K.C. and *Wilfrid Hunt* for the plaintiff. The plaintiff is entitled to the remedy he seeks. The defendants in the action of *Ellis* v. *Noakes* knew they had no title to the timber when they purported to sell it to the present

defendants, and the buyers were affected with notice. The present defendants have therefore committed a tort in that they have converted the property of the plaintiff to their own use. The judgment in the action against Mr. and Miss Noakes was not satisfied: those defendants could not establish any title to the goods as against the true owner, the plaintiff: *In re Gunsbourg* (1); *Bradley & Cohn, Ld.* v. *Ramsay & Co.* (2); *Brinsmead* v. *Harrison.* (3) The judgment in an action for trover or detinue should be considered: compare Bullen and Leake's Pleadings, 8th ed., p. 879; and see Pollock on Torts, 13th ed., pp. 374, 375; Williams on Personal Property, 18th ed., pp. 17, 18. They referred to Order XLVIII. and Order XIII., r. 5.

Holroyd J.'s remarks in his judgment in *Morris* v. *Robinson* (4) are relied on; and see *Cooper* v. *Shepherd* (5); *Cooper* v. *Willomatt.* (6)

[*A. Grant K.C.* mentioned *Barnett* v. *Brandão.* (7)]

They also referred to *Buckland* v. *Johnson.* (8)

A. Grant K.C. and *L. F. Potts* for the defendants. The remedy obtained by the plaintiff against Mr. and Miss Noakes in the first action is a bar to any proceedings against the present defendants. The first defendants were joint tort-feasors, as the facts show: compare *Brinsmead* v. *Harrison* (9); the Court leans against a multiplicity of actions. The plaintiff cannot recover twice; he elected to accept a sum as the value of the goods and has obtained a judgment for that amount, he therefore cannot sue any one else. Also if he gets a judgment and chooses to take under that judgment something short of the full value of the goods, he cannot afterwards claim to recover the full value from some one else. See *In re Gunsbourg* (10) for Warrington L.J.'s remarks. If you elect to take damages, you cannot proceed further: *Rice* v. *Reed.* (11) All the cases cited on behalf of the plaintiff are,

(1) [1920] 2 K. B. 426, 435, 443.
(2) (1912) 106 L. T. 771.
(3) (1871) L. R. 6 C. P. 584.
(4) (1824) 3 B. & C. 196, 206.
(5) (1846) 3 C. B. 266, 271, 272, 273.
(6) (1845) 1 C. B. 672, 674.
(7) (1843) 6 Man. & Gr. 630, 640*n.* (*a*).
(8) (1854) 15 C. B. 145.
(9) L. R. 6 C. P. 584, 587.
(10) [1920] 2 K. B. 426, 447.
(11) [1900] 1 Q. B. 54.

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it is submitted, cases of detinue. See *Bishop* v. *Montague* (1) and also the case of *Brinsmead* v. *Harrison* in the Exchequer Chamber on appeal: (2). The plaintiff has obtained satisfaction and cannot now maintain trover: see *Marston* v. *Phillips* (3) and *Ex parte Drake. In re Ware.* (4) *Buckland* v. *Johnson* (5) is in the defendants' favour, and, it is submitted, has not been overruled: *Smith* v. *Baker.* (6)

The plaintiff cannot sue for two sets of damages. [The argument on behalf of the defendants is further dealt with in the judgment of the learned judge.]

H. B. Vaisey K.C. in reply.

Cur. adv. vult.

March 23. LUXMOORE J. The plaintiff Mr. George Ellis has sued the defendant company for damages for conversion of certain planks of timber and other wood which he claims was at all material times and still is his property. There is no dispute of fact, the questions arising being questions of law. It will be convenient to state the facts before formulating the legal questions arising for decision. [His Lordship stated the facts substantially as set out above.] I gather that the defendant company at the time of their purchase of the timber had some knowledge that there was a dispute as to Mr. and Miss Noakes' title to the timber sold, for they insisted upon and were given an indemnity against any claim which might be made by any third party in respect of the timber, whether as to ownership or otherwise. Subsequently Mr. Ellis ascertained that the defendant company had agreed to purchase the timber, and at the request of his solicitors, one of the directors of the defendant company attended at the trial in the action of *Ellis* v. *Noakes* in order to give evidence of this sale. The trial took place before Clauson J. On January 23, 1930, he dismissed the action against Mr. and Miss Noakes on the ground that the plaintiff had no property in the timber after October 11, 1927. There was

(1) (1600) Cro. Eliz. 824.
(2) (1872) L. R. 7 C. P. 547.
(3) (1863) 9 L. T. 289.
(4) (1877) 5 Ch. D. 866.
(5) 15 C. B. 145, 161.
(6) (1873) L. R. 8 C. P. 350.

an appeal from this order, and on April 9, 1930, the Court of Appeal reversed it, holding that the property in the timber remained vested in Mr. Ellis, although he had not removed it before October 11, 1927, and in the result the Court of Appeal gave judgment for 250*l.* for the plaintiff against Mr. and Miss Noakes. The material part of the order is in these words: "It is ordered that the defendants do pay to the plaintiff the sum of 250*l.* by way of damages for the conversion of the timber." The amount of the damages was fixed at this figure by Clauson J. at the request of the parties at the trial. He said this in his judgment: "It is common ground here that for the convenience of all parties I should treat, and I do treat, this action as one in which, if the sale was one to which the plaintiff can object, the plaintiff is entitled to claim damages for the infringement of his rights occasioned by the sale, in other words, notwithstanding the sale may not have been before the action started, I may treat the action as an action for conversion of the timber by the defendant, and I proceed on that footing. The timber having been sold"—that is, of course, to the defendant company in the present action—"it is quite obvious that no injunction can be granted. That is a reason why the matter resolves itself into one for damages. Assuming for a moment that damages are payable by the defendants for having sold this timber, if I were of that opinion, I should be prepared on the materials before me to assess the damage at the sum of 250*l.* It is perfectly true that I have before me an estimate of the value of the timber which is very considerably in excess of that sum. I have, on the other hand, some evidence from a gentleman who professionally assisted the defendants in regard to the sale that the bulk of the wood fetched 200*l.* There was apparently some not sold which was used by the defendants and allowance is made for that. I think also an allowance must be made for this. At the time after the claim had arisen the title to the timber was not altogether free from doubt. It is true that the purchaser insisted on having an indemnity against claims, and I think I should not be doing injustice if I put the value just a little higher

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than the actual figure turned out in the circumstances could be got. If I assess the damages on the footing of the value of the timber converted, I should fix on the figure of damages 250*l.*"

The plaintiff has not taken any step to enforce the order of the Court of Appeal against Mr. or Miss Noakes. The reason he has given for not doing so is that it would be a useless waste of money, because he is satisfied by inquiry made on his behalf that neither Mr. nor Miss Noakes has any available means to satisfy the judgment either wholly or in part. This being the position the plaintiff instructed his solicitor to write to the defendant company, and he accordingly did so on June 10, 1930, stating that the sale of the timber to the defendant company by Mr. and Miss Noakes was ineffective, as they had no title to the timber, and asking for its return or the payment of its value forthwith. The defendant company repudiated liability, and as the result of this repudiation this action was instituted.

The claim against the defendant company is for damages for conversion. The writ and statement of claim fixed the amount of such damage at 490*l.*, but at the hearing before me the parties by their counsel agreed that the value of the timber acquired by the defendant company should be taken to be 240*l.*, and that this sum should be awarded to the plaintiff in the event of the legal questions in this action being decided in his favour.

The conversion relied on by the plaintiff in the present action is not the sale by Mr. and Miss Noakes to the defendant company but the refusal by the defendant company to return the timber in compliance with the demand made on June 10, 1930, with notice of the fact that the vendors to the defendant company had no title to sell the timber.

The defendant company defends the action on four grounds. First, the company says that at the time the timber was purchased from Mr. and Miss Noakes and when it was removed from Brick Yard Shaw Lodge, it had no notice of the plaintiff's claim to the timber. Secondly, it says that the plaintiff knew that Mr. and Miss Noakes were minded to sell the timber

to the defendant company and that with this knowledge he stood by and allowed the defendant company to purchase the timber and remove it from Brick Yard Shaw Lodge. Thirdly, that the judgment obtained by the plaintiff in his action against Mr. and Miss Noakes in the Court of Appeal on April 9, 1930, is a bar to this present action, because Mr. and Miss Noakes and the defendant company were joint tortfeasors, and the plaintiff by bringing his action against Mr. and Miss Noakes alone has elected to proceed against them only and cannot now proceed against the defendant company. And, fourthly, it says that the form of the judgment of the Court of Appeal is equivalent to a final election on the part of Mr. Ellis to recover the value of the timber from Mr. and Miss Noakes and to abandon his title to the timber itself, and, consequently, Mr. Ellis cannot now rely on that title as imposing any right to recover either the timber or damages for its conversion from the defendant company.

So far as the first point is concerned, I am satisfied that it makes no difference to the position of the defendant company whether it had or had not notice of the plaintiff's claim to the timber when the agreement to purchase it from Mr. and Miss Noakes was entered into or when the timber was removed by the defendant company under that agreement. If in fact the timber was at either of those dates the property of Mr. Ellis, any dealing with it so as to deprive Mr. Ellis of his property, whether with or without notice of his right, would constitute as against him a conversion of the timber. With regard to the second point, I am unable to find a tittle of evidence to support the suggestion that the sale of the timber to the defendant company was made with the knowledge of Mr. Ellis or that Mr. Ellis with knowledge of what was being done stood by and allowed the defendant company to purchase and remove the timber. The sale was indeed made after the writ in the action against Mr. and Miss Noakes was issued. It is true that Mr. Ellis obtained information as to the sale before the action was heard, because he invited one of the directors of the defendant company to

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attend at the trial to give evidence of the sale in order to prove the fact that the timber was converted by Mr. and Miss Noakes. I do not understand how it can be said in these circumstances that Mr. Ellis stood by so as to deprive himself of any right he might otherwise have against the defendant company. In my judgment there is no substance in the second point. In order to succeed on the third point the defendant company must establish that the conversion in respect of which it is being sued is the same as that which constituted the cause of action against Mr. and Miss Noakes —namely, the sale to and purchase by the defendant company. As I have already pointed out, the conversion for which the defendant company is now sued is not the purchase of the timber but the refusal by the defendant company to deliver up the timber to Mr. Ellis in compliance with the demand of June 10, 1930. If this refusal cannot be justified, it constitutes a tort quite distinct from that arising out of the sale and purchase agreement and one in which neither Mr. nor Miss Noakes took any part. In my judgment the third point affords no defence to this action.

The fourth point is one of greater difficulty. It is said that a judgment in trover for the value of property without actual satisfaction does not in any way affect the title to the property of the plaintiff or his right to recover on the judgment. A plaintiff in these circumstances, therefore, may exercise all his rights as owner notwithstanding the judgment. He may seize the property either from the defendant or from any one else in whose hands it may be. Further he may sue another for its specific restitution or for damages, and get a second judgment for the value of the property against that other in respect of any other conversion committed either before or after the conversion on which the first action was brought. Of course he cannot in any case by the exercise of his concurrent remedies obtain a double satisfaction. If he actually recovers the property, his judgment for its value becomes inoperative; and if he recovers its value he cannot exercise his right of recaption or enforce his judgment for specific restitution—in other words, if he receives

the property or its value from one defendant he cannot enforce his judgment against another. This summary is in substance taken from the well known text-book on Torts by the late Sir John Salmond: see Salmond on Torts, 7th ed., p. 416. The authorities on which it is based are stated to be *Brinsmead* v. *Harrison* (1); *Ex parte Drake. In re Ware.* (2); *Morris* v. *Robinson* (3); and *Bradley & Cohn, Ld.* v. *Ramsay & Co.* (4) Similar general statements to that quoted from Sir John Salmond's book are to be found in other well known text-books to which I was referred by counsel during the course of the argument—namely, Pollock on Torts, 13th ed., p. 375; Halsbury's Laws of England, Trover and Detinue, vol. xxvii., p. 916; Bullen and Leake on Pleadings, 8th ed., p. 879; and Mayne on Damages, 10th ed., p. 395. If these statements are correct, they cover the present case.

Mr. Grant on behalf of the defendant company argued that the statement is too wide, and that its accuracy really depends on what is meant by the phrase, "a judgment in trover for the value of the property." He argued that a judgment of this kind is one for the value of the property and for damages, the judgment for the value to be reduced to the amount of the damages if the property is retained in specie; and that a judgment merely for the value without the alternative provision for the return of the property is not a judgment contemplated by the statement.

An examination of the authorities shows I think clearly that in each of the cases *Brinsmead* v. *Harrison* (1) and *Ex parte Drake* (2), the judgment relied on as a bar to a subsequent proceeding was in the alternative form. But this was not so in the case of *Morris* v. *Robinson* (5) nor in the case of *Bradley & Cohn, Ld.* v. *Ramsay & Co.* (4) In *Morris* v. *Robinson* (5) the judgment relied on was for damages for the wrongful sale of certain chests of indigo by the owners of the ship in which they were being carried, the amount of the damages being limited to the value of the ship

(1) L. R. 6 C. P. 584.
(2) 5 Ch. D. 866.
(3) 3 B. & C. 196.
(4) 106 L. T. 771.
(5) 3 B. & C. 196, 206, 207.

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and freight, which was in fact considerably less than the actual value of the chests sold. Holroyd J. in his judgment said the verdict recovered in the first action was not in law sufficient to bar or diminish the plaintiff's claim in the proceeding before the Court, which was against the purchasers from the shipowners, because the ground of the first action was that the sale by the shipowners was wrongful and therefore the action itself could not be a ratification of that sale. He went on to add: "But where in trover the full value of the article has been recovered, it has been held, that the property is changed by judgment and satisfaction of the damages. Unless the full amount is recovered, it would not bar even other actions in trover." Littledale J. said: "But an action of trover is clearly no bar, unless the full value has been recovered. . . . ."

In *Bradley & Cohn, Ld.* v. *Ramsay & Co.* (1) the facts were as follows: Bradley & Cohn, Ld., were shipping merchants and agents doing business between London, South Africa and Australia. The defendants Ramsay & Co. carried on business as jewellers in London. The plaintiff company brought its action for the wrongful detention and alternatively conversion of a parcel of black opals. The defendants by way of defence alleged, among other things, that on March 22, 1909, they bought the opals from one Isidor Braun for 300*l.*, that he was at the time of the purchase by the defendants, Ramsay & Co., the owner of the opals or entitled to pass the property in them to a purchaser. The defendants put in certain alternative defences, but they are not material for consideration in the present case. The circumstances under which the sale by Braun to the defendants was made are stated in the report to be as follows: The plaintiff company had received the opals from a firm abroad for exhibition in this country, with instructions to sell them if not less than 750*l.* could be obtained for them. The opals were exhibited but no sale was effected. Shortly afterwards Isidor Braun persuaded the plaintiff company to allow him to have the opals on approval. Braun declined to give 750*l.* for the stones

(1) 106 L. T. 771, 773, 774, 775.

but offered 300*l.* for them. This offer was communicated to the owners, who refused to accept it. Before the owners' refusal had been received, Braun purported to sell the opals for 300*l.* to the defendants, who acted with complete bona fides in the transaction. When the plaintiff company demanded the return of the opals from Braun, it was discovered that he had sold them to the defendants. Thereupon the plaintiff company brought an action against him for 750*l.*, or alternatively for the return of the stones or damages. This action did not come to trial, because Braun's solicitor wrote offering to consent to judgment for 750*l.*, and judgment was accordingly entered against him for that amount and costs. After the judgment was obtained, Braun was adjudicated a bankrupt. The plaintiff company not having recovered the 750*l.*, or any part of it, brought the action against the defendants for the opals or 750*l.* their value, or damages 750*l.* for their detention. Phillimore J. held that the plaintiff company was debarred from recovering against the defendants by reason of the form of judgment in the action against Braun. The learned judge says this: "I quite agree that an ordinary judgment in detinue does not pass the property until the damages are paid. The case of *Ex parte Drake. In re Ware* (1) is clear on that subject, and the procedure on execution of a judgment in detinue suing in the writ for delivery, or for an order for the delivery of a chattel shows the same. But here the plaintiffs did not take judgment in that form. If they had taken judgment for 750*l.*, and 1*s.* damages, the 750*l.* to be reduced to 1*s.* for damages if the goods were returned, they would have been in the position of the plaintiff in *Ex parte Drake. In re Ware.* (1) But whether it was of importance to Braun to have consented to judgment in another way, or whether it was not, Braun's solicitor offered another form of judgment, and that judgment was the one which the plaintiffs accepted. I think that they accepted a judgment which excluded them from a right to recover the goods, and amounted to a legal transfer of the goods to Braun. That being so, the principle applied by my Lords in the recent case of

(1) 5 Ch. D. 866.

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Whitehorn Brothers v. *Davison* (1) in the Court of Appeal governs the present case. The subsequent transfer to Braun forwards the title of the defendants under Braun. It is in the nature of a further and better assurance of the sale to Braun. Upon that ground and very reluctantly I think that the plaintiffs fail to recover." He then dealt with the question whether an action for detinue is an action of contract or tort. I need not refer to that part of his judgment, but he concluded with this: "I think that the plaintiffs parted with their right to have these goods back from Braun for a judgment for 750*l*." The case went to the Court of Appeal. That Court, which was composed of Cozens-Hardy M.R. and Buckley and Kennedy L.JJ., affirmed the decision of Phillimore J. The first judgment was delivered by Kennedy L.J. The important passage is as follows: "The plaintiffs' contention is that, though they have sued Braun to judgment, they are, notwithstanding, entitled to sue the persons to whom Braun disposed of the opals. The defendants say that the action is not maintainable because the plaintiffs have obtained judgment against Braun, and they cannot sue them, having obtained that judgment. The plaintiffs rely on the case of *Brinsmead* v. *Harrison*. (2) The judgment of Willes J. in that case was not questioned on this point in the Court of Exchequer on appeal, and has never been dissented from since. The plaintiffs on the authority of that case said that, although they had recovered judgment against Braun, the judgment not having been satisfied, it did not result from it that the property in the goods was vested in Braun, and it was therefore open to them to make a claim against the present defendants. No one questions the judgment in *Brinsmead* v. *Harrison* (2), and the only point that we have now to decide is whether it is applicable to the present case. Phillimore J. has held that it is not applicable, because the present plaintiffs did not take the ordinary judgment in detinue. I myself, though I felt some difficulty in the course of the argument, have come clearly to the conclusion that the view that the learned judge took is the

(1) [1911] 1 K. B. 463. (2) L. R. 6 C. P. 584; 7 C. P. 547.

right view, and that, looking at the terms of the letter written by Braun's solicitor which were accepted by the plaintiffs and carried out in the judgment that they obtained against Braun, the plaintiffs did obtain a judgment for the price of these very opals. The authority of *Brinsmead* v. *Harrison* (1) has therefore no application to the present case. The judgment obtained by the present plaintiffs was different from the judgment in that case, and prevents the plaintiffs from suing again for the opals." I think the key to the judgment is to be found in the passage from the judgment of Buckley L.J. He says this: "The second point is this: The plaintiffs brought an action against Braun, and they took a judgment in that action. What was the effect of that judgment? Kennedy L.J. has dealt with that at length, and I have little to add to what he has said. It seems to me that in that action, looking at the pleadings, the claim which the plaintiffs were putting forward—whether rightly or wrongly is immaterial for this purpose—was this: These goods were delivered to Braun upon the terms that he should either pay 750*l.* or return the goods. He did not return the goods; he is liable to pay 750*l.*, and the plaintiffs claim payment by him of that sum of 750*l.* They were in fact affirming, although it may be with regard to what I have said that the appro contract was at an end. On June 8, 1909, Braun had said: 'I think if you deal carefully with your correspondent that you will be able to obtain a substantial reduction for me on the price asked, for which I am responsible.' Then the letter of October 15, 1909, I think, was written upon this footing: 'I have looked into the matter for my client, and I now accede to your view that you are entitled to sue him for 750*l.*—not for damages measured by 750*l.*, but you are entitled to sue him for 750*l.*' That may have been the footing that on March 22, 1909, there was a continuing appro contract, and under s. 18, r. 4 (*a*), of the Act of 1893 the property had passed, which it may be they were affirming was right. I think that that was the footing upon which the judgment was given: There was no allegation at

(1) L. R. 6 C. P. 584.

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all that 750*l.* was the value for the purpose of recovering value as distinguished from the price; there is no such allegation in the pleadings. The defendant Braun was acceding to the view that he was responsible for the price, and judgment was being taken for the price. It may either be expressed in that way or in the way that the learned judge in the court below expressed it when he used these words: 'I think that the plaintiffs parted with their right to have these goods back from Braun for a judgment for 750*l.*' That, of course, means that at the date of that judgment—which, I think, was October 15, 1909—the property passed. In my view the property passed at the earlier date—namely, at the date when the letter was written—when the bargain was made between the parties. But at any rate it seems to me that the learned judge in the court below was right in deciding that the judgment amounted to an affirmation as between the plaintiffs and Braun of Braun's property in the goods. Having affirmed the property in the goods, they cannot maintain this subsequent action."

It seems to me to be plain that the judgment in the action against Braun was consented to by him and accepted by the plaintiff company on the footing that there was a contract for sale and purchase by Braun for 750*l.*; and on this basis a judgment for 750*l.* would necessarily operate as a recognition of Braun's title. In such circumstances it was impossible for the purchasers from Braun to be guilty of conversion. A judgment for damages for conversion obviously differs from one for an agreed purchase price. I am unable to understand how it can be said that a mere judgment for damages for conversion constitutes an election by the owner of the property to confirm any title to it in the convertor, for the convertor cannot have any title which can be confirmed. The title which a convertor subsequently obtains through satisfaction of the judgment for the value of the property converted is not by confirmation but by estoppel.

It was contended by Mr. Grant that the decision of the Court of Appeal in *In re Gunsbourg* (1) supported his argument.

(1) [1920] 2 K. B. 426.

He based his argument on the statement by Warrington L.J. that the orders relied on were in effect the same as the ordinary alternative judgment for delivery of goods or their value ascertained by the jury, and he contended that this statement establishes by implication the proposition that the acceptance of a judgment for the value of the goods, without any alternative order for the delivery of the goods, constituted an election by the plaintiff to abandon his title to the property converted. I do not so read the judgments, nor do I think there is anything in the decisions or judgments in that case which is contrary to the other authorities to which I have referred.

It is true that a plea of judgment in an action for trover was held in *Buckland* v. *Johnson* (1) to be a bar to a subsequent action where there had been no satisfaction of the former judgment. This decision is in conflict with the other authorities and was not followed in *Brinsmead* v. *Harrison* (2), but it is to be noticed that the judgment there relied on was apparently a judgment for the value of the goods without any alternative provision for the delivery up of the goods.

The conclusion which I have come to, after a consideration of the cases, is that whether the judgment is in the alternative form, or is merely a judgment for the value of the goods or for damages for their conversion, the owner of the property is not, in the absence of special circumstances, divested of his title thereto unless and until the judgment is fully satisfied.

In the present case the form of the judgment against Mr. and Miss Noakes is for 250*l.* damages for conversion. This is not the price of the timber paid to them by the defendant company, but the sum fixed by the judge at the request of the parties as the value of the timber. It is, I think, impossible to hold that there are in the present case any special circumstances sufficient to constitute any confirmation by the plaintiff of any title to the timber in Mr. and Miss Noakes, for in fact they had no such title; and this was the basis of the plaintiff's complaint in the action. Nor can

(1) 15 C. B. 145. (2) L. R. 6 C. P. 584; 7 C. P. 547.

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it, in my judgment, properly be said that the plaintiff by accepting the judgment in the form he did in the action against Mr. and Miss Noakes conferred any title on them or either of them or on the defendant company by estoppel.

In my judgment, for the reasons I have endeavoured to express, the defendant company has failed to justify its refusal to deliver up the timber, and I accordingly give judgment for the plaintiff for 240*l.*, the agreed amount of the damages for its conversion. The defendant company must pay the plaintiff's taxed costs.

Solicitors: *Kingsford, Dorman & Co., for Dawes, Son & Prentice, Rye; Williamson, Hill & Co.*

A. R. T.

NOTE.

ELLIS *v.* NOAKES.

[1928. E. 744.]

C. A. 1930. The plaintiff's appeal in this case from Clauson J. was heard on April 4 and 9.

H. B. Vaisey K.C. and *Wilfrid Hunt* for the plaintiff.
A. Grant K.C. and *L. F. Potts* for the defendants.

LORD HANWORTH M.R. This action was brought by Mr. George Ellis against Mr. Joseph Noakes and his sister, Mary Victoria Noakes, the defendants, and the claim is for a declaration that certain timber which has been sold by the defendants was and is the property of the plaintiff. There is a further claim for an injunction to restrain the defendants from dealing or interfering with the timber, and for damages. The defence deals with a number of smaller matters not material upon the appeal, but the chief defence is in para. 6: "The defendants submit that the plaintiff by reason of his not having removed the timber before the 11th October, 1927, has forfeited all interest therein, and that the same now belongs to and is the property of the defendants." There was a counterclaim also for some damage caused to the land on which the plaintiff had sawed and converted the timber, but the learned judge considered that to be a trivial matter in respect of which no damage had been proved, and he dismissed that counterclaim. He also dismissed the plaintiff's claim, holding that the plaintiff had not established that he had any property in the timber which the defendants had dealt with and converted.

The case takes us back into old law and cases decided when the wealth of the country was largely in real property and its appurtenances and before

the industrial revolution had begun. I will state the facts shortly. There was an estate near Hastings, called the Coghurst Estate, of which a Mr. Lord was the owner. He was minded to sell this estate in lots. On July 28, 1925, the defendants purchased Lot 40 for a sum of 725*l.* excluding the timber. It is a desirable small holding, having an area of about 10 acres, with a large garden, 4½ acres of pasture, and 5½ acres of valuable woodland. As I have said, the defendants purchased that excluding the timber, and on September 29, 1925, the conveyance was executed.

The question that we have to deal with turns upon the proper construction of that deed, but before dealing with that I will complete the story in outline. Not all the lots were sold for which particulars were prepared, and the portions which were not sold, including some excepted timber lots, were assigned on December 31, 1925, to the Coghurst Estates, Ld., a company which had then just been formed. On April 26, 1926, the plaintiff bought from the company the timber, which was excepted from the conveyance of September 29, 1925; the acceptance of his offer is dated April 1, 1926, and is in these terms: "We are instructed by the Coghurst Estates Ld. to accept your offer of 650*l.* for the timber situated as follows, viz.: Uckfield and Rodgers Wood and Brick Yard. . . . . The timber to be cleared as stated in catalogue particulars and by date therein stated." The timber bought on Lot 40, by that letter of acceptance which refers to the Lots, was about 141 trees, representing 2706 cubic feet or what I may call 2000 cubic feet net when sawn. The plaintiff thereupon entered upon the wood, and by June 10, 1927, all the trees that he had bought on this Lot 40, which is the timber in question, had been felled. Between August 13 and September 3, 1927, a quantity of sawing was done on the ground by contractors; and I think Mr. Noakes assisted the contractor, some 170*l.* being spent by the plaintiff in cutting up the timber which had been felled into planks. The planks so sawn were not removed by October 11, the date fixed in the Particulars, and when the plaintiff endeavoured to remove the planks after that date, the defendants refused him facilities and alleged that these planks had become their property and were no longer the property of the plaintiff. They have in fact sold these planks. The sale, we are told, took place after the writ had been issued, but by consent of the parties—a consent which was accepted by Clauson J.—the sale was treated as having taken place before the writ was issued, so as to make it unnecessary, if the plaintiff had established his right, to impose an injunction; and Clauson J., for the purposes of any judgment in the Court of Appeal, has held that the value of the planks which have been sold and thus converted by the defendants, is a sum measured in damages at 250*l.*

The writ was issued on June 28, 1928. The learned judge has held that the plaintiff has not established a property in the timber that was sold, so that although he comes to a conclusion as to the measure of damages, he finds that the plaintiff has not established his case. He therefore dismissed the claim, and he also dismissed the counterclaim, as I have already stated.

On appeal we have had a number of interesting questions raised. It is unnecessary for us to deal with more than one or two points of those decided by Clauson J., because the vital point depends on the proper construction of the conveyance of September 29, 1925—the conveyance to the defendants.

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On a number of other points we are in agreement with Clauson J., but they do not affect the vital point which we have to determine.

I need hardly say that I should differ from a conclusion reached by Clauson J. with diffidence; but in this case we have had the advantage of hearing arguments on both sides which have been of considerable assistance to the Court, and have had some cases referred to which Clauson J. had not, I think, the advantage of examining. I therefore find myself able to deal more freely with the matter.

Clauson J. has come to the conclusion that the exception which is contained in the conveyance must be read as a whole, and that read as a whole the timber which has passed into possession of the plaintiff was timber which could not become his unless the conditions which alone prevented its passing to the defendants had been complied with. Clause 2 of the conveyance says: "There are excepted out of the hereditaments hereinbefore described and there are reserved unto the mortgagee and the vendor respectively and their respective heirs and assigns (*a*) All timber (*b*) All manorial rights and (*c*) A right in favour of the mortgagee and the vendor" as to certain other matters. The important exception is the timber, and that is expressed in these terms: "All timber timberlike and other trees tellers saplings poles and underwood either cut or growing on the property hereby conveyed (hereinafter referred to as 'the said timber') with full right and liberty for the mortgagee and the vendor respectively and their respective heirs and assigns or other the owner or owners for the time being of the said timber and his and their servants and licensees to enter upon the hereditaments hereby assured or any part thereof at all times up to the 11th day of October 1927 with or without horses carts waggons or other vehicles whether drawn or self propelled and whether laden or unladen and to fell and remove in a proper and usual manner the said timber including all faggots and debris by such routes over the hereditaments hereby assured as may be agreed upon by the owner or owners of the said timber his or their heirs and assigns and the purchasers and in default of agreement as may be determined by an umpire to be appointed by them." Clauson J., as I have said, considered that that clause effects only an exception of timber which is cut and taken away by October 11; in other words, that it is a conditional exception only from the parcels which are otherwise conveyed, and that unless that condition is completely fulfilled the exception fails, and the timber and the trees pass with the other parcels under the conveyance to the defendants. Is that right? Close examination of the clause itself reveals that first of all it specifies all timber and certain details relating to the timber such as "saplings poles and underwood either cut or growing on the property hereby conveyed (hereinafter referred to as 'the said timber')"; then follows an addition introduced by the conjunctive word "with," "with full right and liberty." Is it right then to read the clause as a single and indivisible whole, or to take separately the timber that is excepted and the rights attached to it, as something which is a concomitant right, but not an integral part of the exception? The difference is well exhibited by reference to the anonymous case to which Mr. Grant called our attention. (1) The case is so short that it is worth quoting as a whole. "The case was; A., seised of certain lands bargained and sold by indenture all the trees there growing, habendum, succidendum, and exportandum, within twenty years after the date of the said indenture, the

(1) (1584) 1 Leonard, 275.

twenty years expire; the bargainee cuts down the trees. A. brought an action of trespass for cutting down the trees; and by Wray Justice, the meer property of the trees vests in the bargainee, and the limitation of time which cometh after, is not to any purpose but to hasten the cutting of the trees within a certain time, within which, if the vendee doth not cut them, he should be punished as a trespasser as to the land, and not as to the trees: Gawdy contrary; And that upon this contract, a conditional property vests in the vendee, which ought to be pursued according to the direction of the condition, and because the condition is broken, the property of the trees is vested in A." Clauson J. has agreed with the view of Gawdy J., but, after a full argument, we are in favour of the view which was adopted by Wray J., and I cannot express it in better words. The property in the trees is in the person to whom they were reserved " and the limitation of time which cometh after, is not to any purpose but to hasten the cutting of the trees within a certain time." In other words, the exception is of all timber, as explained and expanded by the other terms used, all of which are defined in the exception as " the said timber," together with a right to take the said timber, which is to be exercised within a time limit. That time limit does not, however, import a condition into the exception or render the property in the timber one which upon the failure to comply with the time limit, causes a reverter of the property in the timber to the purchaser of Lot 40.

It has been argued, in opposition to that view, that unless the clause is read as a whole and given the meaning which Clauson J. assigned to it, there is difficulty in giving effect to the words in which the right is expressed, because upon a sale of timber there would be, incidental to that sale, a licence to get the timber. Parker J. expressed that view in *James Jones & Sons, Ld.* v. *Earl of Tankerville* (1), where he says: " If A. sells to B. felled timber lying on A.'s land on the terms that B. may enter and carry it away, the licence conferred is an irrevocable licence, because it is coupled with and granted in aid of the legal property in the timber which the contract for sale confers on B."; and he refers, as an authority for that proposition, to *Wood* v. *Manley*. (2) The Court there held that the sale of goods to a party carried with it the right to get them, and Lord Denman said (3): " the argument goes this length: If I sell goods to a party who is, by the terms of the sale, to be permitted to come and take them, and he pays me, I may afterwards refuse to let him take them. The law countenances nothing so absurd as this: a licence thus given and acted upon is irrevocable "; and Patteson J. says (3): " A person does buy; part of his understanding is that he is to be allowed to enter and take. The licence is therefore so far executed as to be irrevocable .... but here the licence is part of the very contract." And so it is said in the present case the licence is part of the contract and to be treated as imposing upon the contract, or rather upon the exception, an integral term.

The explanation of this principle is to be found in *Earl of Cardigan* v. *Armitage*. (4) Bayley J., in giving the judgment of the Court, a judgment, that is, of Holroyd and Best JJ. as well as himself, says (5): " the express liberty is introduced by the words 'together with,' as if the intention were to increase what had preceded, not to diminish; and I take it

(1) [1909] 2 Ch. 440, 442.
(2) (1839) 11 Ad. & E. 34.
(3) (1839) 11 Ad. & E. 37.
(4) (1823) 2 B. & C. 197.
(5) (1823) 2 B. & C. 208, 209.

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to be a general rule, that words tending to enlarge shall not (unless the intention is very plain,) be taken to restrain. . . . . The express liberty here is . . . . to sink pits, to sough and get the coals. . . . . It may be taken as clear, that an express liberty does not always control what would otherwise exist, especially if the express liberty goes beyond what would be implied." And later, after considering *Stukeley* v. *Butler* (1), he says (2): "To restrain what is prima facie unlimited, the words should be plain and the intention clear."

After consideration of those observations made by very learned authorities in the past, I do not think it is correct to say that no proper interpretation can be given to the right added to the exception of the timber, unless it is taken as part of the exception. Those authorities appear to indicate that on a sale of timber or an exception of timber, together with the right to get it, it is not necessary to treat the words conferring the right as a condition of the sale or exception. Those words may not be otiose, but may be intended either to amplify the licence that would be implied, or to have some other effect which does not take away the implied right which would be attached at law to the sale or exception. With those authorities before us, it appears to us that the right interpretation to be given to this exception is that there is absolutely excepted from the parcels in this conveyance all "the said timber," and that there is appended to that exception, a right and liberty to go on to the premises at any time before October 11 for the purpose of getting the timber. If the person who is getting the trees goes after that date, he may be liable to damages for what he does, though he would not be liable for any damage if the same acts were committed before October 11; but whether the acts of getting are done before or after October 11, they do not effect any alteration in the property of the timber which is excepted from the conveyance. We thus differ from Clauson J. in his interpretation of the conveyance, and it appears to us that there is an absolute exception of the timber which enabled the Coghurst Estates, Ld., to sell that timber to the plaintiff.

It is said, however, that the contract of sale to the plaintiff imports the provision for clearance by October 11 contained in the Conditions of Sale under the words to be found in the letter: "the timber to be cleared as stated in catalogue particulars and by date therein stated." It is very doubtful whether it is open to the defendants to rely upon this point. At best it would seem that in putting it before the Court they are relying upon a jus tertii, for condition (*c*) provides: "Upon the failure to get the timber within two years from the 11th October then the timber trees are immediately on the expiration of the said period of two years to become the property of the vendor"—that is of the Coghurst Estates, Ld. We agree, however, with Clauson J. in thinking that the words at the end of the letter of April 1: "The timber to be cleared as stated in catalogue particulars and by date therein stated," do not effect an introduction of the complete condition (*c*) and that the defendants cannot impute a failure to comply with that condition to the plaintiff so as to defeat his right. More than that, when condition (*c*) is examined carefully, it will be seen that the property which passes to the vendor upon the expiration of the period of two years is "the timber trees," that is, such timber trees as shall not be cleared within that time. The trees had, however, not only been felled and the cordwood taken, but the trees had

(1) (1615) Hobart, 168. (2) 2 B. & C. 213.

been sawn into planks at an expenditure of no small sum. These planks cannot be regarded as the timber trees which are to revert to or become the property of the vendor under condition (*c*). It is not possible, therefore, for the defendants to defeat the plaintiff's title by any reference to the terms on which he purchased, even if some complaint or claim might be made by the Coghurst Estates, Ld.

That being so, I turn to Clauson J.'s judgment to see what the effect of this determination of the Court of Appeal is. We have differed from him upon the construction, and say that what was reserved by the conveyance was all the timber trees, to which the parties added a particular right to get them before a particular date. We have decided further that if condition (*c*) applies at all, it applies in favour of the vendor, and not in favour of the defendants; and we hold that it is a case in which the defendants, by selling, have been guilty of conversion. We agree with Clauson J. that it is not a case in which all the rights of the plaintiff are negligible, because he might have had to commit a trespass in order to get possession of the timber, and we accept Clauson J.'s view that this alone would not deprive the plaintiff of a right to damages. Of course, we also accept the sum which Clauson J. has decided upon as measuring the value of the timber—namely, 250*l*.

The result is that, for the reasons which I have given, the appeal must be allowed: the order of Clauson J. must be set aside, save in so far as it deals with the counterclaim, and judgment must be entered for the plaintiff for 250*l*. damages with costs here and below.

LAWRENCE L.J. I agree. The main question on this appeal depends upon the true meaning and effect of the exception of timber contained in the conveyance of September 29, 1925. Clauson J. has held that, according to the proper construction of that conveyance, the exception is limited to such timber as should have been felled and removed from the land comprised in the conveyance before October 11, 1927, and that consequently the sawn planks in question in this action were excepted from the grant and belonged to the defendants, who were justified in selling them and in retaining the proceeds for their own use. However much such an interpretation may appeal to the practical mind as being a reasonable businesslike arrangement for the parties to have entered into, I do not think that it can properly be spelt out from the language employed in the conveyance. The vendor, whilst granting to the defendants the soil of the entire piece of land, upon part of which the timber in question was growing, excepted the timber out of the grant and reserved it to himself his heirs and assigns. The effect of this exception in my opinion is that no estate or interest in the timber passed to the defendants under or by virtue of the conveyance. It is true that to this exception there is appended a liberty to the vendor, his heirs and assigns, to enter upon the property comprised in the conveyance at all times up to October 11, 1927, and to fell and remove the timber, but the limited liberty so reserved does not, in my opinion, operate to qualify the absolute character of the exception and confine it to such timber only as had been felled and removed before October 11, 1927. The exception is expressed in unambiguous terms, and in my opinion it would be contrary to the accepted canons of construction to imply a limitation to that exception merely because a liberty to enter upon the land and fell and remove the timber before a given date is superadded.

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In view of the express liberty so conferred, the right of the vendor or his assigns to enter upon the land comprised in the conveyance after October 11, 1927, may be open to doubt; but whatever right of entry the owner for the time being of the reserved timber may have, and whether that right be one held in respect of an estate in fee simple in the trees, or merely of a profit à prendre (see *Barrington's Case* (1) and *Stanley* v. *White* (2)), in my opinion, the conveyance does not operate to confer any estate or interest in the timber upon the purchaser of the land. The true view may well be that the power which by law is incident to an exception of timber, to enter upon the land of the grantee in order to fell and take it away (see Williams' Notes to *Pomfret* v. *Ricroft* (3)), is not cut down by the express limited liberty: see *Earl of Cardigan* v. *Armitage.* (4) In the circumstances of this case, however, it is not necessary to decide what right the vendor had to enter upon the defendants' land and fell and remove the reserved timber after October 11, 1927, nor is it necessary to decide whether the reservation operated to leave or vest in the vendor an estate in fee simple in the trees, or merely a profit à prendre. The facts which render such a decision unnecessary are that the plaintiff as assignee of the vendor felled the timber and severed it from the inheritance within the time limited by the conveyance and then manufactured it into planks. As the estate and interest in the trees was admittedly vested in the vendor and his assigns at the time when the timber was felled, it follows in my opinion that the property in the planks was from the first and thereafter remained in the plaintiff.

The plaintiff might have been placed in some difficulty if the defendants had merely persisted in their alleged right to prevent him from removing the planks from off their ground, but in my judgment they had no right to convert the planks to their own use. *Mills* v. *Brooker* (5) is an example of the well-established proposition of law that where an owner of land has upon it some property belonging to another he is not entitled to convert that property to his own use, although he may remove it. The conversion in the present case took the form of the defendants selling the planks and retaining the proceeds for their own use. This was clearly wrong, if I am right in my conclusion that the property in the planks was in the vendor or his assigns.

There remains one further point made by Mr. Grant—namely, that under the contract of sale of the timber by the Coghurst Estates, Ld., to the plaintiff, the plaintiff's right to the timber was forfeited to his vendor or to the defendants as assigns of that vendor. That argument was based on the following words in the contract of sale of April 1, 1926: "the timber to be cleared as stated in catalogue particulars and by date therein stated." It was contended that those words were wide enough to include the stipulation as to forfeiture contained in the Conditions of Sale applicable to the timber lots offered for sale under these conditions. This stipulation provided that the purchaser should fell and remove the timber before a given date, and that he should forfeit all timber whether growing or felled which should still remain upon the property on that date to the vendor his heirs and assigns,

(1) (1611) 8 Co. Rep. 136*b*.
(2) (1811) 14 East, 332.
(3) (1669) 1 Saund. 321.
(4) 2 B. & C. 197.
(5) [1919] 1 K. B. 555.

the owner or owners for the time being of the land upon which the trees were or had been growing. Clauson J. has held, and I entirely agree with him, that the stipulation as to forfeiture was not incorporated into the contract between the Estates Company and the plaintiff, and therefore, in my judgment, neither the jus tertii set up by the defendants nor the claim to the trees made by the defendants as grantees of the land from the original vendor can prevail, with the result that the appeal should be allowed.

ROMER L.J. I agree, and do not find it necessary to add many words, because I find myself in complete agreement with Clauson J. upon the points decided by him except that relating to the construction of the exception contained in the conveyance of September 29, 1925—a point that does not admit of elaborate treatment or discussion. It was held by Clauson J. that all that was excepted in relation to the timber was so much of the timber upon the land conveyed to the defendants as the vendor or those claiming under him should remove by October 11, 1927. If that had been the intention of the parties, nothing could have been easier than for them to have said so. But when I look at the words of the exception, so far from their having said so, I find that what is first reserved is: "all the timber on the property hereby conveyed" without any apparent qualification. Of course, the conveyance does not stop there, and I must not stop there for the purpose of considering the true construction of the exception. But when I come to the words which follow—words which Clauson J. has held had the effect of cutting down the generality of the preceding words—I find that they are words introduced by the word "with," a word which prima facie points to something being added to what has gone before, and not to something being taken away from what has gone before. As was said by Bayley J. in the passage in *Earl of Cardigan's* case (1), to which the Master of the Rolls has already referred: "I take it to be a general rule, that words tending to enlarge shall not (unless the intention is very plain) be taken to restrain." With great respect to Clauson J., I am unable to find in the words giving a liberty to enter and cut and take away an intention to restrain the generality of the preceding words, whether I regard that liberty as one given in addition to the liberty of entering, cutting and taking away that are implied at common law, or as exclusive of that common law liberty. It follows that the whole of the timber on the defendants' land remained vested in the vendor without any qualification whatsoever.

The property in that timber accordingly passed to the plaintiff, unless the words at the end of the contract by which the timber was sold to the plaintiff in some way qualified that property. Upon that point I have nothing at all to add to what was said by Clauson J., and to what has been said by the other members of the Court. In my opinion, the unqualified property in the timber which the vendor retained passed to the plaintiff. That being so, whether or not the plaintiff could, after October 11, 1927, enter upon the defendants' land for the purposes of removing that timber—a point upon which I do not think it necessary to express any concluded opinion—the defendants had no right whatsoever to convert that timber to their own use.

(1) 2 B. & C. 197, 208.

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Having converted it by selling it for 250*l.*, it seems to me necessarily to follow that the plaintiff is entitled to judgment for that sum against them. I agree with the order which has been proposed by the Master of the Rolls.

Solicitors: *Kingsford, Dorman & Co., for Dawes, Son & Prentice, Rye; Patersons, Snow & Co., for Thorpe, Meadows & Pearson, Hastings.*

LUXMOORE J. 1932 *March* 3, 4, 8.

WILKINS *v.* LEIGHTON.

[1931. W. 85.]

Nuisance—Excavation of natural Slope and Erection of retaining Wall—House built on adjoining Land at higher Level—Collapse of retaining Wall—Normal Use of Land—No cause of action.

The owner of land situate on a steep natural slope built in 1888 a house called "A. Hall." The ground was then excavated on the upper side to a depth of thirteen feet, forming a vertical bank on the boundary. In order to protect this from weathering and crumbling the owner erected a retaining wall some seventy feet long and thirteen feet high. The adjoining land beyond and above the wall was left unbuilt on until 1925, when a house was erected and was afterwards purchased by the defendant A. L. Early in 1930 the retaining wall collapsed almost entirely, causing pressure against and damage to an outside wall of a room which had been built on to "A. Hall."

The plaintiff alleged and the Court found as a fact that the collapse of the wall was due to the additional pressure upon it caused by the weight of the new house built in 1925, and he claimed a mandatory order to restore the wall and to take such further steps as might be necessary to prevent any further damage to his property, and an injunction and damages:—

Held, that the defendant A. L. as the owner of the house was under no liability to the plaintiff, based on the doctrine of *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330, as her predecessor in title had only used the land for the natural and normal purpose of building a house on it.

Held, also, that the claim as based on nuisance failed, as there was no evidence that the defendant knew or could have known that her house constituted a nuisance or hidden danger to the plaintiff's property, or that any such nuisance in fact existed.

The case was covered by the decision of the Court of Appeal in *St. Anne's Well Brewery Co., Ld.* v. *Roberts* (1929) 140 L. T. 1.

Barker v. *Herbert* [1911] 2 K. B. 633 applied on the question of nuisance.

Rylands v. *Fletcher* (1868) L. R. 3 H. L. 330 distinguished.

WITNESS ACTION.

The plaintiff brought this action for damages for negligence and nuisance and a mandatory injunction. The facts are

fully set forth in the judgment of the learned judge, but shortly stated are as follows: The plaintiff owned a house called "Aberdare Hall," a boarding-house, situate in Sea Road, Boscombe, and which was built in 1888 on a steep slope of sand and gravel. When built the site was excavated so as to leave a vertical bank thirteen feet in height on one side, and in order to protect this from weathering, the then owner of the house built a retaining wall thirteen feet high and seventy feet long. In 1925 the defendants' predecessor in title built upon the adjoining land beyond the retaining wall and bank a house, designed by an architect, which was completed in 1926 and afterwards purchased by the defendant Mrs. Leighton. In February, 1930, the plaintiff's retaining wall collapsed for almost its whole length. The plaintiff alleged that the collapse of his wall was entirely due to the pressure of the defendant's house upon the soil above it, and that it was the duty of the defendant in building a house in a higher position on sandy soil to carry down the foundations to a much greater depth than would have been needed, but for the plaintiff's excavated site and retaining wall.

J. D. Casswell for the plaintiff. Having regard to the position of the plaintiff's house, the building of a house like "Brown Eaves," which belonged to the defendant, on the land above the retaining wall constituted a danger to the plaintiff's property, unless the foundations were carried down to a considerable depth: *Rylands* v. *Fletcher* (1); *Ilford Urban District Council* v. *Beal.* (2) It was impossible to bring a quia timet action. The building of a house may be a normal use of land, but it is not natural and safe to place a house on the edge of a sandy cliff, the consequence of which has been the collapse of the plaintiff's retaining wall: *Attorney-General* v. *Cory Brothers & Co.* (3); *Crowhurst* v. *Amersham Burial Board.* (4)

[The following cases were also referred to: *Hoare & Co.* v. *McAlpine* (5); *Middleton* v. *Humphries.* (6)]

(1) L. R. 3 H. L. 330.
(2) [1925] 1 K. B. 671.
(3) [1921] 1 A. C. 521.
(4) (1878) 4 Ex. D. 5.
(5) [1923] 1 Ch. 167.
(6) (1913) 47 Ir. L. T. 160.

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[LUXMOORE J. referred to *St. Anne's Well Brewery Co., Ld.* v. *Roberts.* (1)]

A. Newman Hall for the defendants. There are certain things which a man may do on his land whether they cause damage or not: *Bradford Corporation* v. *Pickles.* (2) He is entitled to use his land in a normal manner, and one of the most normal uses of land is to build a house on it. The doctrine of *Rylands* v. *Fletcher* (3) does not apply; it only arises when the defendant has brought or placed some unusual or dangerous thing on his land and, for instance, allowed it to escape. A house is not unusual or dangerous. All that has happened is that the plaintiff's wall has collapsed on to his own property and carried with it some of the earth behind it. If the predecessors in title of the plaintiff had not excavated their land in a sandy soil, no damage could have occurred. By so doing they took the risk of future damage. The case is covered by the decision in *St. Anne's Well Brewery Co., Ld.* v. *Roberts* (1), and *Attorney-General* v. *Cory Brothers & Co.* (4) does not apply.

As regards nuisance, the defendants have caused no nuisance and had and could have had no knowledge of the existence of a nuisance. They purchased their house "Brown Eaves," believing it to be well and safely built. The defendants have done nothing to damage the plaintiff's property and are under no obligation to him to take special precautions to preserve it from damage.

LUXMOORE J. In this action the plaintiff by his writ asks for a declaration that the defendants are bound to erect a wall or other sufficient works to prevent the land or buildings known as "Brown Eaves," Michelgrove Road, Boscombe, from encroaching or subsiding upon or injuring his land adjacent thereto, and to indemnify him against all damage, expense or loss incurred as a result of this encroachment, subsidence or injury. The plaintiff also claims an injunction to restrain the defendants from suffering or

(1) 140 L. T. 1.
(2) [1895] A. C. 587.
(3) L. R. 3 H. L. 330.
(4) [1921] 1 A. C. 521.

causing this encroachment, subsidence or injury; an order that the defendants should forthwith erect a wall and take all necessary steps to prevent any further encroachment, subsidence or injury from taking place, and that they should repair all damage caused by the subsidence; and damages for trespass and nuisance.

There are two defendants, Mr. and Mrs. Leighton. It has been proved to my satisfaction that the house known as "Brown Eaves" is the property of the defendant Mrs. Agnes Leighton, and that her husband has no interest in it. There is therefore no possible claim against him.

The facts are as follows: The plaintiff is the owner of a house called "Aberdare Hall," Sea Road, Boscombe. It was built about the year 1888 on a natural slope. When it was being built the site of the house and garden was levelled to a considerable extent. The ground on the east side of the site was excavated to a depth at its maximum of about thirteen feet. In this way a miniature cliff was formed on the boundary of the plaintiff's property. The geological formation at this point consists of strata of sand and gravel, and is of such a character that if cut vertically there is little tendency for the face of the cutting to slip apart from the effect of weathering. In order to prevent weathering a wall some seventy feet long and thirteen feet high was built by the owner of "Aberdale Hall" at the time the excavation was made.

In 1925 the land on the east side of "Aberdare Hall" was not being used for any purpose, except that on the southern portion earth and refuse was being dumped. In that year the then owner, a Mr. McArdle, was minded to build on it; for this purpose he employed an architect to design a house. The house called "Brown Eaves" was then erected. It was built within some three feet of the plaintiff's boundary. The northern part of the land on which "Brown Eaves" was built was supported by the northern part of "Aberdare Hall," the main eastern wall of which was built up against the plaintiff's boundary, but on the south-west side of "Brown Eaves" there was no artificial support for the

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excavated cliff except the retaining wall. A sun parlour was about this time erected as an addition to the south-east side of "Aberdare Hall." The eastern wall of this sun parlour ran parallel with the retaining wall and was about two feet distant from it. The building of "Brown Eaves" was completed in 1926, and was purchased by the defendant Mrs. Leighton in that year. At that time a Mrs. Ward was the owner of "Aberdare Hall." She erected a high wattle fence on the eastern side of "Aberdare Hall" so as to prevent those living at "Brown Eaves" from overlooking her property. This fence was for part of its length about twenty feet high, and this part was fixed between substantial posts embedded in the ground of "Aberdare Hall," and was also supported by iron supports attached to the retaining wall. The highest part of this wattle fence was at the end of the wall nearest the south-west corner of "Aberdare Hall"; the rest of the wattle fence was some seven or eight feet lower, this part being attached to the retaining wall by iron supports. In 1927 the plaintiff purchased "Aberdare Hall." In 1928 a portion of the retaining wall to which the lower end of the wattle fence was attached fell for a distance of about twenty feet. I find as a fact that this fall was due to the effect of the south-westerly gales on the wattle fencing. The retaining wall was rebuilt and repointed with cement mortar so as to leave it in a stronger condition than it had been before, but the wattle fence was not re-erected, and in consequence Mrs. Leighton had a light close wooden fence erected on her land to fence it off from "Aberdare Hall."

On February 12, 1931, a part of the retaining wall about seventy feet in length fell. The plaintiff alleges that the fall was due to the pressure caused by the superimposition of the weight of the house "Brown Eaves" upon the subjacent soil, and the fact that "Brown Eaves" was so constructed that its foundations were not taken down to a sufficient depth into the soil. He says that the defendant's land has, so to speak, overflowed on to his land as the result of the placing on the defendant's land of a burden which ought not to have been placed there by reason of its physical features, and that

if the burden had not been so placed he would have suffered no damage. It is said that the collapse of the wall began at a point where the defendant's house "Brown Eaves" was causing its maximum thrust on the plaintiff's land. I have heard a considerable body of evidence, and I am satisfied that the retaining wall in fact fell owing to the additional thrust on it caused by the weight of the house "Brown Eaves," though its stability may have been affected to some extent by the effect of the south-westerly gales on the wattle fencing. The evidence satisfies me that if the foundations of "Brown Eaves" had been carried down level with the garden of "Aberdare Hall" no additional strain would have been imposed on the wall.

On the assumption that the building of "Brown Eaves" was the cause of the collapse of the plaintiff's wall, the question is, is the defendant liable to the plaintiff for the damage? It has been argued that he is liable on either one of two grounds: first, that the case comes within the principle of *Rylands* v. *Fletcher* (1), and secondly, on the ground of common law nuisance. I do not think the rule in *Rylands* v. *Fletcher* (1) has ever been applied to anything brought on to land in its normal use. It was argued by Mr. Casswell that it was not a normal use of land to build a house without carrying down the foundations so as to ensure the safety of the adjoining property, and he relied on *Ilford Urban District Council* v. *Beal* (2), but in that case the defendant was held not liable for damage to a sewer, because he did not know and could not reasonably have been expected to have known of the existence of the sewer.

I think that the case is covered by the decision of the Court of Appeal in *St. Anne's Well Brewery Co., Ld.* v. *Roberts*. (3) In that case the plaintiffs were the owners of an inn, one side of which was bounded by the ancient city wall of Exeter, part of which was the property of the defendants. On either side of the fireplace in the kitchen of the inn, recesses had at some time unknown been formed by means of

(1) L. R. 3 H. L. 330, 338. (2) [1925] 1 K. B. 671.
(3) 140 L. T. 1, 6.

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excavations made in the wall. In 1927 a considerable portion of the city wall belonging to the defendants collapsed and completely demolished the plaintiff's inn. The Court held that as there had been no abnormal or unnatural use of the defendants' property and they were not occupiers of the wall when the damage took place, the doctrine of *Rylands* v. *Fletcher* (1) did not apply. The plaintiffs in that case sought to make the defendants liable, both on the doctrine of *Rylands* v. *Fletcher* (1) and also on the ground of a common law nuisance. Scrutton L.J. on the first point said this (2): "It has been frequently said that the doctrine of *Rylands* v. *Fletcher* (1) does not apply to what may be called the normal use of land. I will not put it in my own words. I will put it in the words of Lord Cairns L.C. in *Rylands* v. *Fletcher* (1), who says: 'My Lords, the principles on which this case must be determined appear to me to be extremely simple. The Defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained that that result had taken place.' Now that passage about the normal use of land is not only Lord Cairns', because in a later case of *Wilson* v. *Waddell* (3), where Lord Blackburn gave the judgment of the Court, the facts were that the land in its ordinary condition drained in a particular way, and the water went in a particular way. There the occupier of a coalfield excavated all the coal from the land, with the result that the water went in quite a different way on to the land of a different adjoining owner. And the different adjoining owner said: Your land in its natural state sends its water to A. You have done something to the land

(1) L. R. 3 H. L. 330, 338. (2) 140 L. T. 1, 6.
(3) (1876) 2 App. Cas. 95, 99.

which sends it to me, B. You are liable under the doctrine of *Rylands* v. *Fletcher*. (1) Lord Blackburn after reading the passage that I have read from Lord Cairns says this: 'The general rule of law in both countries'—that is England and Scotland—'is that the owner of one piece of land has a right to use it in the natural course of user, unless in so doing he interferes with some right created either by law or contract; and as a branch of that law, the owner of the minerals has a right to take away the whole of the minerals in his land, for such is the natural course of user of minerals'; and then he cites the passage from Lord Cairns to the effect that if when that is done or if using it in the normal way the water in the ordinary course is diverted somewhere else, there is no cause of action by third parties for damage by the receipt of the water, because the owner, the occupier of the land, is only using it in the normal way." And further on the learned Lord Justice says: "One of the most normal uses of land, it appears to me, is to put buildings on it . . . ."

In my judgment the decision of the Court of Appeal in *St. Anne's Well Brewery Co.* v. *Roberts* (2) on this point is indistinguishable from the present case. I come to the conclusion, therefore, that on the first point the plaintiff fails. On the second point, Scrutton L.J. in the *St. Anne's Well* case said: "Then the next line of attack was this: It is said, 'Anyhow, this wall falling was a nuisance.' I think it was correct to say that it was a nuisance, and not a trespass, because neither the owner nor the occupier themselves threw this wall into the plaintiffs' property; it fell into the plaintiffs' property from indirect causes, not by direct action of the owner or occupier of the plaintiffs' land; and therefore I think it is correct to treat it as a nuisance and not a trespass . . . . No doubt the first question to decide . . . . is: who was the occupier of the wall?" And then, having come to the conclusion that one Wilson was the occupier of the premises, he goes on: "I think also it is clear law that the person liable for a nuisance on premises is certainly the occupier. And I think also that it has been

(1) L. R. 3 H. L. 330, 338. (2) 140 L. T. 1, 6.

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established by authority binding on this court here—I refer to *Barker* v. *Herbert* (1), which has been followed by other cases in this court—that the occupier himself is not liable if he did not create the nuisance on the land he occupies unless—perhaps not even then—knowing of the nuisance or being in such a position that he ought with reasonable care to have known of the nuisance, he allows it to continue. I refer to the passages in Fletcher Moulton L.J.'s judgment in *Barker* v. *Herbert* (1) and to the passage in Farwell L.J.'s judgment; and therefore if Wilson had been sued for nuisance, he being the occupier of this wall, which was the nuisance, I think the question to be determined in his case would have been: Did you know that there was a nuisance? Ought you with the exercise of reasonable care to have known there was a nuisance? And if both those questions were answered in the negative, there would have been no liability on the occupier." To make the occupier liable the plaintiff must prove that he had knowledge of the existence of the nuisance.

In the present case there is no evidence to show that the defendant knew of the existence of any nuisance or was guilty of any negligence. The action therefore fails, and I dismiss it with costs.

Solicitors: *Bentleys, for Other, Manning & Boileau Tredinnick, Bournemouth; James & James, for Oscar H. Whittingham, Bournemouth.*

(1) [1911] 2 K. B. 633, 642, 643, 645.

A. R. T.

GENERAL MEDICAL COUNCIL *v.* WARING.

LUXMOORE J.

1932

April 29.

[1932. G. 956.]

Dentist—Dental Board—Qualification of Member of Board—Appointment by General Medical Council—Member of Branch Council—Member of Board ceasing to be Member of Council—Dentists Act, 1921 (11 & 12 *Geo.* 5, *c.* 21), *ss.* 2, 16; *Sch. I., paras.* 4, 5, 6.

Under the Dentists Act, 1921, a Dental Board is constituted for the regulation and registration of members of the dental profession, and by the First Schedule the Board is to be composed of seven appointed members and six elected members. Of the appointed members three are to be appointed by the General Medical Council, of whom one shall be a member of the Branch Council for England. By para. 6 of the Schedule provision is made in the event of the place of a member of the Board becoming vacant before the expiration of his term of office by death, resignation or otherwise, for the filling of the vacancy:—

Held, that a member of the Board who had been appointed thereon by the Branch Council for England as being a member of that Branch Council, but who had ceased to be a member of the General Medical Council and of the Branch Council, was no longer qualified to be a member of the Dental Board, and that his office was vacant.

MOTION.

The plaintiffs, the General Council of Medical Education and Registration of the United Kingdom, and the Dental Board of the United Kingdom, claimed a declaration that the defendant Sir Holburt Jacob Waring, having ceased to be a member of the General Council, had thereby lost his qualification for membership of the Dental Board as constituted by the Dentists Acts, 1858 to 1923, and that his place as a member of the Dental Board had become vacant, and an injunction to restrain the defendant from taking any part in the proceedings of the Dental Board.

The action was in fact a friendly proceeding brought in order to obtain a decision on the true construction of the Dentists Act, 1921, and notice of motion for an injunction was given in order to have the question decided without delay.

It appeared from an affidavit filed on behalf of the plaintiffs by the Registrar of the General Medical Council and of the Dental Board that the Council was first constituted by the Medical Act, 1858, and reconstituted in 1886. The Dentists'

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Register was first created by the Dentists Act, 1878. The Dentists Act, 1921, amending the Dentists Act, 1878, and the provisions of the Medical Act, 1886, prohibited by s. 1 the practice of dentistry by unregistered persons, and by s. 2 established the Dental Board and provided for the appointment of its Registrar by the General Council. The provisions contained in the First Schedule to the Act were to have effect with respect to the constitution and proceedings of the Board.

Para. 4 of the First Schedule provided as follows: "After the expiration of the term of office of the first members of the Board, the Board shall be composed of seven appointed members and six elected members.

Of the seven appointed members one (who shall be the Chairman of the Board) shall be appointed by the Privy Council, and three, who shall not be registered medical practitioners or registered dentists, by the Minister of Health, the Scottish Board of Health, and the Lord Lieutenant of Ireland respectively, and three by the General Council, of whom one shall be a member of the branch council for England, one a member of the branch council for Scotland, and one a member of the branch council for Ireland."

The remainder of para. 4 dealt with the election of elected members by qualified and registered dentists. By para. 5 any members of the Board other than the first members thereof were to hold office for a term of five years. By para. 6, if the place of a member of the Board became vacant before the expiration of his term of office, whether by death, resignation or otherwise, the vacancy was to be filled by appointment or election by the body of persons by whom the member was appointed or elected, and any person appointed or elected to fill a casual vacancy was to hold office so long only as the member in whose place he was appointed or elected would have held office.

At the time of the constitution of the third Dental Board in 1929 the defendant was a member of the General Council chosen by the Royal College of Surgeons of England, one of the medical corporations referred to in s. 6 of the Medical

Act, 1858, and he was the member of the Branch Council appointed by the Council as a member of the Board. He had been a member of the two previous Boards, and he had been a member of the Council since 1917. The defendant's period of office as representative of the Royal College of Surgeons of England on the Council expired on March 10, 1932. He was not re-elected by the College, and thereupon ceased to be a member of the Council and of the Branch Council for England.

Schiller K.C. and *D. C. Bartley* for the plaintiffs.
Vaisey K.C. and *R. T. D. Acland* for the defendant.

LUXMOORE J. The question I have to determine is whether, according to the true construction of the Dentists Act, 1921, the defendant Sir Holburt Waring is still a member of the Dental Board constituted under that Act. Sir Holburt became a member of the Dental Board on its first constitution. He was reappointed on two occasions, his last reappointment being on July 31, 1929. After the passing of the Dentists Act, 1921, he was appointed by the General Council of Medical Education and Registration of the United Kingdom as one of the three members whom they are entitled to appoint under that Act, his qualification being that he was a member of the Branch Council for England of the General Medical Council. On March 10, 1932, the defendant ceased to be a member of the Branch Council for England. In the ordinary course, if he had not ceased to be a member his appointment as a member of the Dental Board would have lasted until July 31, 1934. The question is whether his appointment as a member of the Dental Board terminated on March 10, 1932, by reason of his ceasing on that date in the ordinary course to be a member of the Branch Council for England of the General Medical Council. The answer to the question depends on the construction of the Dentists Act, 1921, but before dealing with that I think it is material to state that the General Medical Council, which was first constituted under the Medical Act of 1858, is to-day constituted under that Act as amended by the Act of 1886.

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In 1878 the Dentists Act was passed. By s. 15 the administration of that Act was placed in the hands of the General Medical Council. By the Dentists Act, 1921, it is provided that a Dental Board should be set up. Sect. 2 of the Act provides (sub-s. 1): "For the purposes of the principal Act"—that is, the Dentists Act, 1878—"and this Act, there shall be established a Board (hereinafter referred to as 'the Board') which shall be a body corporate by the name of the Dental Board of the United Kingdom, with perpetual succession and a common seal . . . . (Sub-sect. 2:) The provisions contained in the First Schedule to this Act shall have effect with respect to the constitution and proceedings of the Board." The First Schedule to the Act provides (para. 1) that the Board shall consist of thirteen members. (Para. 2:) On its first constitution, the Board is to be composed of "a Chairman appointed by the Privy Council; three persons, not being registered medical practitioners or registered dentists,"—that is three laymen—"appointed by the Minister of Health, the Scottish Board of Health, and the Lord Lieutenant of Ireland respectively:" (The Governor-General of Northern Ireland has now taken the place of the Lord-Lieutenant); "three persons to be appointed by the General Council, of whom one shall be a member of the branch council for England, one a member of the branch council for Scotland, and one a member of the branch council for Ireland; six persons who are or have been engaged in the practice of dentistry, of whom two, to be appointed by the Privy Council, shall be persons who were not registered under the principal Act before the passing of this Act, and of whom four, to be appointed as to two thereof by the Minister of Health, as to one thereof by the Scottish Board of Health, and as to one thereof by the Governor-General of Northern Ireland, shall be persons who were so registered." (Paragraph 3:) "The first members of the Board shall hold office for such term not exceeding three years from the commencement of this Act as the Privy Council may determine." I understand they held office for three years. (Paragraph 4:) "After the expiration of the term of office of the first members of the

Board, the Board shall be composed of seven appointed members and six elected members." The same number of thirteen is still to be maintained. "Of the seven appointed members one (who shall be the Chairman of the Board) shall be appointed by the Privy Council, and three, who shall not be registered medical practitioners or registered dentists, by the Minister of Health, the Scottish Board of Health" and the Governor-General of Northern Ireland "respectively, and three by the General Council, of whom one shall be a member of the branch council for England, one a member of the branch council for Scotland, and one a member of the branch council for Ireland." Then provision is made for the manner in which the six elected members shall be elected. I do not think there is anything else to which I need refer in that paragraph so far as this question is concerned. (Paragraph 5:) "Any members of the Board other than the first members thereof shall hold office for a term of five years." (Paragraph 6:) "If the place of a member of the Board becomes vacant before the expiration of his term of office whether by death, resignation or otherwise, the vacancy shall be filled by appointment or election by the body or persons by whom the member was appointed or elected, and any person appointed or elected to fill a casual vacancy shall hold office so long only as the member in whose place he is appointed or elected would have held office: Provided that, where the unexpired portion of the term of office of the vacating member is less than one year, the vacancy shall not be filled." (Paragraph 7:) "Any member ceasing to be a member of the Board shall be eligible for re-appointment or re-election."

The real question is whether under the provisions of this Schedule it is necessary for the person who is to be appointed or elected to have a certain qualification at the moment of appointment or election, or whether it is necessary that that qualification shall continue so long as the member holds office? The Schedule is not drawn with any great clarity. One would certainly expect to find, if it was so meant, an express provision that the loss of the particular qualification

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for appointment or election should disqualify a member from continuing to hold office. There is no such express provision in the Schedule, although there is an express provision in s. 16 of the Act which provides (sub-s. 1): "The General Council shall for the purpose of the exercise of their functions under the principal Act and this Act, consist of the ordinary members of the Council and of three additional members to be appointed by the Privy Council in accordance with the provisions of this section." (Sub-s. 2:) "No person shall be qualified for appointment as an additional member of the General Council unless he is a member of the Board, and is registered in the dentists' register as a graduate or licentiate in dental surgery or dentistry." (Sub-s. 3:) "An additional member of the General Council shall, unless he previously ceases to be a person qualified for appointment as such, hold office for such period not exceeding five years as the Privy Council may appoint." This is an express provision that if an elected or appointed member ceases to be qualified he, ipso facto, ceases to be an additional member of the Council. There is, as I have already pointed out, no such provision in the Schedule, but the Schedule obviously contemplates that a man may cease to be a member of the Board before the period of his appointment has expired, for para. 6 provides: "If the place of a member of the Board becomes vacant before the expiration of his term of office whether by death, resignation or otherwise, the vacancy shall be filled by appointment or election," . . . . and the right of appointment or election is given to the particular body or constituents who were entitled to appoint or elect in the first instance. It is difficult to see that there is any meaning at all in the words "or otherwise" unless they have reference to a vacancy occurring by reason of the cesser of the qualification required for election or appointment, because there is no other way in which a member of the Board can cease to hold office otherwise than by death or resignation unless it is by ceasing to hold qualification, and it is impossible to give any meaning to the words "or otherwise" unless that be the correct view. I think this view is supported when one

considers the careful manner in which provision is made for the constitution of the Board. The Board is to consist of thirteen members. Each of those members is appointed to represent a particular body, and certainly it would appear reasonable that if a qualification is required as a condition precedent to appointment or election as a member of the Board, that such qualification should continue to be held during the period of office. As I said before, the Schedule is not clearly drafted, but giving it the best consideration I can, the conclusion I come to is that on the true construction of the Act a person appointed or elected a member of the Board ceases to be a member of the Board and his place becomes vacant if he ceases to hold that qualification which it is necessary for him to hold in order to be appointed or elected. In the circumstances, as the plaintiffs wish to treat this motion as the trial of the action, I will make the declaration asked for.

Solicitors for all parties : *C. J. S. Harper ; Beaumont, Son & Rigden.*

H. L. L.

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[1932. B. 219.]

Practice—Third Party Notice—Will—Fund lost by Administrators and their Solicitors—Action against them by Beneficiaries to recover Fund—Third Party Notice by Administrators to co-defendant Solicitors alleging fiduciary Negligence—Claim, whether raisable—R. S. C., Order XVIA., *r.* 12, *sub-r.* 1 (*b*) *and* (*c*).

By Order XVIA., r. 12, sub-r. 1: "Where a defendant claims against another defendant (*a*) that he is entitled to contribution or indemnity, or (*b*) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or (*c*) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff or the defendant making the claim and should properly be determined not only as between the plaintiff and the defendant making the claim but as between the plaintiff and that defendant and another defendant or between any or either of them, the defendant making the claim may without any leave issue and serve on such other defendant a notice making such claim or specifying such question or issue."

The administrators with the will annexed of a testator's estate gave to the solicitors acting for them on behalf of the estate a number of cheques signed in blank. The solicitors filled in and handed one of these cheques to a firm of outside brokers for the purpose of investing a sum of money in an authorized security. The firm of brokers became insolvent and the money was lost. An action was commenced by certain beneficiaries under the will against the administrators and the solicitors for the recovery of the money. The administrators issued a third party notice to their co-defendants (the solicitors) claiming to be indemnified by them against the plaintiffs' claim; or in the alternative contribution in respect of the said claim; also, further relief in respect of negligence and breach of their fiduciary duty as solicitors to the administrators—namely, by way of damages for the said negligence, a sum equivalent to the amount which had been lost; or in the alternative compensation for the loss alleged to have been occasioned by reason of the said breach of duty. On a procedure summons:—

Held, by Bennett J., that the relief claimed by the third party notice was not substantially the same as that claimed in the action, and was not, therefore, within the provisions of Order XVIA., r. 12, sub-r. 1 (*b*) and (*c*); and that the defendant administrators were not entitled to raise in the third party notice any of the claims raised except those relating to indemnity and contribution.

On appeal :—

Held, that the meaning of r. 12, sub-r. 1, was that if the claim made by a defendant against his co-defendant was connected with the claim which the plaintiff made against both defendants and was one which in the event of the plaintiff being successful would determine which of the two defendants ought to bear the ultimate loss, it was one in which the claim made by the defendant against his co-defendant was "substantially the same" as that made against both the defendants within the meaning of clauses (*b*) and (*c*) of the rule.

Held, therefore (reversing the decision of Bennett J.), that the case came within the provisions of r. 12, sub-r. 1, and that the administrators ought to be allowed to raise the claim raised by them in their third party notice.

PROCEDURE SUMMONS.

This procedure summons arose out of an application for directions made by two of the defendants in an action of *Burford* v. *Clifford* against their three co-defendants under the provisions of R. S. C., Order XVIA., r. 7, the application being made on behalf of the defendants William Francis Burford and George Henry Burford.

The question for the determination of the Court was between the applicants on the one side and their co-defendants Richard Sutton Clifford, Richard Sutton Clifford (Junior), and Horace Montague Clifford on the other side.

The plaintiffs in the action claimed to be beneficiaries under the will of the late William Francis Burford. The defendants to the action were, first, three persons named Clifford carrying on business as solicitors under the style of "Cliffords," and, secondly, two persons named Burford, who were the administrators with the will annexed of the estate of William Francis Burford.

The testator by his will gave to his wife the weekly sum of 1*l.*, to his daughter Lilian Burford (one of the plaintiffs) the weekly sum of 10*s.*, to one of his sons (one of the defendants) a specific legacy of his household goods and certain freehold houses, a pecuniary legacy to another of his sons (another defendant), a specific legacy of certain freehold properties to another of his sons, the plaintiff Albert Charles Burford, and a specific legacy of certain

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freehold properties to his daughter, the plaintiff Ida Elizabeth Wilson; and he directed that as soon as his funeral and testamentary expenses had been paid his trustee should divide the money in the Westminster Bank and the Post Office, Derby, equally between his sons and daughters named in the will.

The executor named in the will having predeceased the testator, administration with the will annexed was granted to the defendants William Francis Burford and George Henry Burford, and they employed as their solicitors the remaining three defendants with regard to the administration of the estate of the testator. The allegation of the plaintiffs was that on the advice of the defendants Cliffords and in breach of trust the defendant administrators, on or about November 8, 1930, handed to the defendants Cliffords a cheque book issued by the Westminster Bank, Ld., with all the cheques therein signed in blank by the defendant administrators, delegated to the solicitors the administration of the testator's estate, and authorized them to draw on the sum standing to the credit of the defendant administrators at the bank (being the testator's money in the bank referred to in his will) by filling in and issuing the cheques so signed as aforesaid. The plaintiffs further alleged that the defendant solicitors in breach of trust on or about January 27, 1931, filled in one of the cheques with the name of "Arthur Wheeler & Co." as the payees and the sum of 1878*l.* 19*s.* as the amount payable to them, and sent the cheque so filled in to Arthur Wheeler & Co. They also alleged as follows: "Arthur Wheeler & Co. were a firm of outside stockbrokers whom the defendants Cliffords on or about January 26, 1931, instructed to purchase 1800*l.* 5 per cent. War Loan, for the purpose of providing for the annuities bequeathed by the will of the testator. On or about January 28, 1931, Arthur Wheeler & Co. obtained payment of the said cheque for 1878*l.* 19*s.* At the time of such payment the said firm were hopelessly insolvent, and in or about the month of March, 1931, were adjudicated bankrupt, and never delivered the said sum of 1800*l.* War Loan or any

part thereof or any security whatsoever. In consequence the whole of the said sum of 1878*l.* 19*s.* has been irretrievably lost. In dealing with the said sum of 1878*l.* 19*s.* in manner aforesaid the defendants Cliffords were guilty of a gross breach of trust: (1.) in making any payment at all out of the said money at the Westminster Bank for the purpose of providing for the said annuities; (2.) in paying the said sum to Arthur Wheeler & Co.; (3.) in not obtaining delivery of the said sum of War Loan at or within a reasonable time after payment; (4.) in not recovering the said sum of 1878*l.* 19*s.* from Arthur Wheeler & Co. before the bankruptcy of that firm occurred. The plaintiffs claim (1.) a declaration that all the defendants are jointly and severally liable to make good to the estate of the testator the said sum of 1878*l.* 19*s.* with interest; (2.) an order on the defendants jointly and severally to pay into Court or as the Court shall direct the said sum of 1878*l.* 19*s.* with interest; (3.) if and so far as may be necessary administration of the estate of the testator; (4.) that the defendants may be ordered to pay to the plaintiffs the costs of this action."

The defendants Burfords delivered a defence, and in that defence they admitted that on the advice of the defendants Cliffords they handed to the defendants Cliffords a cheque book issued by the Derby (Midland Road) Branch of the Westminster Bank with all the cheques therein signed in blank, but deny that in so doing they (the defendants Burfords) were guilty of any breach of trust. They alleged that the cheques were signed at the suggestion of the defendants Cliffords for the purpose of enabling the defendants Cliffords to pay the funeral and testamentary expenses and debts of the testator and were with two exceptions used for no other purpose. Then they stated that they had no legal knowledge and had had little experience in business matters, and relied absolutely in all matters relating to the administration of the estate upon the advice given them by the defendants Cliffords. They further alleged that they were advised by the defendants Cliffords and stated that they believed that the moneys in the

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Westminster Bank, Derby (Midland Road) Branch, were properly applicable in providing for the legacies and annuities given by the will; and that, acting on such advice, they authorized the defendants Cliffords (inter alia) to purchase a sum of War Stock sufficient to provide the annuities given by the will; but that they did not authorize the defendants Cliffords to use for such purchase any of the said signed cheques. In these circumstances they claimed relief and relied on ss. 23 and 61 of the Trustee Act, 1925.

The defendants Cliffords admitted in their defence that their co-defendants handed to them a cheque book issued by the Derby (Midland Road) Branch of the Westminster Bank with all the cheques therein signed in blank, at the suggestion of these defendants, for the purpose of enabling the defendants Cliffords to pay on behalf of their co-defendants the funeral and testamentary expenses of the testator. They further alleged that the defendant G. H. Burford (acting on behalf of himself and the defendant W. F. Burford) verbally instructed them through their managing clerk to purchase 1800*l.* 5 per cent. War Loan for the purpose of providing for the annuities, and verbally and expressly authorized them, through him, to purchase the same through the firm of Arthur Wheeler & Co., and to pay the purchase price thereof by filling in one of the said cheques drawn upon the said bank.

In those circumstances and on those pleadings the defendants Burfords served the defendants Cliffords under the provisions of R. S. C., Order XVIA., r. 12, with a third party notice which, as amended pursuant to the leave given by the Court to the applicants, was in these terms:—

The defendants William Francis Burford and George Henry Burford claim against you to be indemnified against the plaintiffs' claim and the costs of this action and against the costs of and incidental to this notice and the necessary . . . . proceedings consequent thereon or in the alternative contribution in respect of the said claim and also the following further relief, namely:—

(*a*) A declaration that the said sum of 1878*l.* 19*s.*, forming part of the said estate, has been lost owing to your negligence

and breach of fiduciary duty as solicitors for the defendants William Francis Burford and George Henry Burford, the administrators of the said estate, on the following grounds, namely: (1.) that the said sum was by the testator's will given to the plaintiffs and the defendant George Henry Burford; (2.) that it was your duty to advise the said defendants that the said sum ought to be paid to the said legatees and not to be invested or otherwise dealt with; (3.) that the said sum was paid by you to Arthur Wheeler & Co. contrary to the express directions of the defendants William Francis Burford and George Henry Burford; and (*b*) by way of damages for the said negligence the sum of 1878*l.* 19*s.* and interest, or, in the alternative, compensation for the loss of the said sum of 1878*l.* 19*s.* or any part thereof by reason of the said breach of duty, with all necessary accounts and inquiries.

This summons for directions was adjourned into Court so that the question (inter alia) might be decided as to the extent to which the defendant administrators were entitled to claim the relief which they set out in the third party notice.

R. H. Hodge for the plaintiffs.

J. N. Gray for the defendant administrators. No impropriety is alleged against any of the parties. The administrators claim that, as the money has been lost, the solicitor defendants have been guilty of a breach of duty, and they claim damages or compensation from them for their negligence as solicitors which amounted to a breach of that duty. The administrators' claim comes under Order XVIA., r. 12, sub-r. 1 (*b*) (1), and in any case under

(1) Order XVIA., r. 12, sub-r. 1: "Where a defendant claims against another defendant
(*a*) that he is entitled to contribution or indemnity, or
(*b*) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or
(*c*) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant

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(*c*), as this is a question or issue of fact raised on the pleadings as to the circumstances in which the cheque was signed, and as to the authority to make this particular investment.

The questions at issue between the plaintiffs and the defendants are substantially the same as those between the administrators and the solicitors. The questions are the same, whether the solicitors are trustees or not. The plaintiffs allege that the solicitors were trustees. The administrators are also entitled to raise the question whether, if the solicitors were not trustees, they were guilty of a breach of duty. There is a very narrow line of distinction between the man who is subject to a duty and the man who is a trustee, but the results in law are not identical.

[He referred to *Baxter* v. *France* (1); *In re Dangar's Trusts* (2); *Nocton* v. *Lord Ashburton* (3); and *Lockhart* v. *Reilly*. (4)]

In the present case the question relates not to mere negligence as a solicitor, but to a duty which has not been carried out. The solicitors have not failed in their duty to the Court, but in their duty as fiduciary agents.

[The following authorities were also cited: *Craig* v. *Watson* (5); *Dixon* v. *Wilkinson* (6); *Chapman* v. *Chapman* (7); *British Mutual Investment Co.* v. *Cobbold* (8); *In re Turner* (9); *In re Linsley* (10); and *Soar* v. *Ashwell*. (11)]

R. F. Roxburgh for the defendant solicitors. There is no reported case on the rule in its present form. Clauses (*b*) and (*c*) are only intended somewhat to amplify clause (*a*) and

making the claim and should properly be determined not only as between the plaintiff and the defendant making the claim but as between the plaintiff and that defendant and another defendant or between any or either of them,

the defendant making the claim may without any leave issue and serve on such other defendant a notice making such claim or specifying such question or issue."

(1) [1895] 1 Q. B. 591, 593.
(2) (1889) 41 Ch. D. 178, 184.
(3) [1914] A. C. 932.
(4) (1856) 25 L. J. Ch. 697.
(5) (1845) 8 Beav. 427.
(6) (1859) 4 De G. & J. 508.
(7) (1869) L. R. 9 Eq. 276.
(8) (1875) L. R. 19 Eq. 627.
(9) [1897] 1 Ch. 536.
(10) [1904] 2 Ch. 785.
(11) [1893] 2 Q. B. 390.

not to introduce some new form of third party notice. A somewhat similar rule has, however, been construed.

The applicants are claiming damages for breach of duty to them. If the solicitors are constructive trustees, all the defendants are liable and the plaintiffs will obtain a judgment against all of them.

Relief founded on breach of trust and relief founded on negligence are in their nature different.

Baxter v. *France* (1) is reported on the form of the rule existing in those days (R. S. C., Order XVI., r. 52). That rule is substantially different from the present rule.

A second point is raised by the defendant solicitors—namely, that they are entitled to have the question of negligence alleged against them tried by a jury.

[BENNETT J. I shall not deal with the second point if it does not arise.]

BENNETT J. [after stating the facts down to the end of the statement of claim substantially as above set out, continued :] On those pleadings the case of the plaintiffs against all the defendants was a case which had as its foundation a trust—in the case of the defendants Burfords, an express trust; in the case of the defendants Cliffords, a constructive trust. The case against all of them is rested upon a trust, and the claim of the plaintiffs is that that trust has been broken, with the result that the testator's estate has lost a sum of 1878*l.* 19*s.*, which the plaintiffs ask that the trustees may be ordered to restore to the trust estate. [His Lordship then referred to the defences and, after reading the third party notice, continued :] Having issued that notice, the summons for directions which is now before me was taken out, under the provisions of r. 7 of the Order, and the question between the Burfords on the one side and the Cliffords on the other side is this, whether, as Mr. Gray for the Burfords contends, I should give directions which will permit his clients the Burfords to claim against the Cliffords not merely to be indemnified against the plaintiffs'

(1) [1895] 1 Q. B. 591.

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claim or to have some contribution made by them towards the plaintiffs' claim, but also to deliver a statement of claim which will enable his clients to litigate against the Cliffords on the lines indicated or suggested by the third party notice, in addition to the claims for indemnity and for contribution.

Now, the question, in my judgment, turns upon the proper construction of Order XVIA., r. 12, because Mr. Gray, I think, for his clients concedes that if the matter or question or claim alternative to the claim of indemnity and contribution is outside the scope of r. 12, I ought not to make any order giving him leave to deliver to his co-defendants a statement of claim raising that matter or issue or claim. Now r. 12, sub-r. 1, of Order XVIA. is in these terms: "Where a defendant claims against another defendant: (*a*) that he is entitled to contribution or indemnity . . . ." —so far as further relief claimed in the third party notice is concerned, it is conceded that that is not a claim for contribution or indemnity, so that we are not concerned with clause (*a*). Then: "(*b*) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action, and substantially the same as some relief or remedy claimed by the plaintiff." Now, the conditions which have to be fulfilled before the third party notice can be given under that paragraph are two. First of all, the defendant serving the third party notice has to satisfy the Court that the relief or remedy which he claims relates to the original subject-matter of the action—that is the first condition. The second condition is that it must be substantially the same as some relief or remedy claimed by the plaintiff. The subject-matter of the action is the payment to Arthur Wheeler & Co. by one of these signed cheques of 1878*l.* 19*s.* The relief which the plaintiffs claim in respect of that cause of action is payment into Court or restoration to the estate of the testator William Francis Burford of the sum of 1878*l.* 19*s.* which has been lost, and they claim that relief against all the defendants.

Now, the question is whether the relief which the defendants who have served the third party notice claim

against those defendants upon whom it has been served is the same as or substantially the same as the relief which the plaintiffs claim against all the defendants. If you look at the claim which the applicants are making by their third party notice, you find that what they claim is not a restoration to the trust estate of anything, but a sum of damages which is to be paid to compensate the applicants for the loss occasioned to the applicants by reason of the breach by the defendants upon whom the third party notice has been served of some duty arising out of the relation of solicitor and client existing between the applicants and those defendants, and, in my judgment, upon the language of the rule, it is not possible to say that the relief which the defendants who have served the third party notice claim against those defendants upon whom they have served it is substantially the same as some relief which the plaintiffs claim in the original action. So that the case does not seem to me to fall within the terms of Order XVIA., r. 12, sub-r. 1, cl. (*b*).

Then the question is whether it falls within cl. (*c*). Clause (*c*) reads in this way: [His Lordship read cl. (*c*) and continued:] So that what one has to see is whether, as between the defendants serving the third party notice and the defendants upon whom the third party notice is served there is a question or issue relating to the subject-matter of the action which is substantially the same as some question or issue arising between the plaintiffs and the defendants making the claim, that is to say, in this case, between the plaintiffs and the Burfords. The further relief which the Burfords claim from the Cliffords on this third party notice is relief arising out of a breach by the Cliffords of a duty which they owed to the Burfords as solicitors and nothing else—that is the basis of it; and although that relief may involve some questions which are in issue between the plaintiffs and the Burfords, the substantial question is the question whether it was the duty of the Cliffords to give certain advice to the Burfords. The other questions are really immaterial. There is no question or issue raised

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between the plaintiffs in this action and the defendants Burfords as to any duty of the Cliffords to advise the plaintiffs as solicitors, and, therefore, as it seems to me, the condition which has to be fulfilled before the case comes within the provisions of cl. (*c*) of the rule is not, on the facts, fulfilled.

In those circumstances, that part of the third party notice in which the defendants Burfords ask for certain further relief against the defendants Cliffords is, in my judgment, outside the scope of Order XVIA., r. 12, and in dealing with the summons for directions, the directions that I think I ought to give are directions which will exclude the defendants who have served the notice from raising in the third party proceedings any question except the question of contribution or indemnity.

There was another ground which was urged by Mr. Roxburgh before me, arising from the provisions which are contained in Order XXXVI., his contention being that, assuming that the further relief which the applicants desire to have under the third party notice is within the scope of r. 12 of Order XVIA., yet, having regard to the fact that the question raised by the further relief was one which they had a right to have tried by a jury, therefore no direction ought to be given for a trial on this application. Having regard to the view I have taken upon the construction of r. 12, it is not necessary for me to consider Mr. Roxburgh's argument, and I express no view upon it at all.

I decide the matter in his favour upon the ground that, in my judgment, the further relief claimed by the applicants is outside the scope of Order XVIA., r. 12, and the directions that I propose to give on this application are, that the applicants the Burfords shall within fourteen days deliver to the defendants the third parties a statement of their claim, such claim being limited to claims to be indemnified against the plaintiffs' claims, or to have contribution made by the third parties in respect of the plaintiffs' claims, and that the third parties deliver a defence to that statement of claim within fourteen days after the delivery of the applicants'

statement of claim, and that the issues arising on those pleadings be decided immediately after the trial of the action by the judge who tries the action.

J. L. D.

The administrators appealed. The appeal was heard on May 9, 1932.

J. N. Gray for the administrators. The administrators put their case as one of breach of fiduciary obligation on the part of the solicitors and not on negligence at common law. The subject-matter of the action is whether the 1878*l.* 19*s.* ought to be replaced, and, if so, by whom. The plaintiffs say that it ought to be replaced by the defendants. The defendants Burfords say that it ought to be replaced by the defendants Cliffords. The question on the third party notice is whether the defendants Cliffords are liable to replace the money, and the case is therefore clearly one which falls within r. 12 of Order XVIA. If the defendants Burfords succeed in showing that the defendants Cliffords are trustees they will be entitled to contribution. The relief claimed by the third party notice is so inextricably mixed up with the main claim in the action that the two claims ought to be dealt with in the same action. If a separate action were brought for the relief claimed by the third party notice it would undoubtedly be ordered by the Court to be consolidated with the main action.

The question turns on the meaning of the words "substantially the same" in clauses (*b*) and (*c*) of r. 12, sub-r. 1. The natural meaning of those words is that the relief must be the same in substance, but need not necessarily be the same in form. In fact, it is impossible to imagine a case coming within the rule where the relief would be the same in form. The decision of Bennett J. amounts to a decision that the added clauses (*b*) and (*c*) of r. 12, sub-r. 1, have not widened the scope of that rule at all. Here, it is submitted, the relief claimed by the plaintiffs and the administrators respectively is substantially the same and the questions arise on the same facts.

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Where a solicitor-trustee has been guilty of a breach of trust he is bound to indemnify his co-trustee, notwithstanding that the co-trustee has himself been a party to the breach of trust: *Lockhart* v. *Reilly* (1); see also *In re Turner*. (2)

[ROMER L.J. In the present case the solicitors were not express trustees.]

They had made themselves trustees for the administrators: *Soar* v. *Ashwell*. (3)

In either case it is negligence, and what the administrators are relying on is the negligence of the solicitors. The solicitors here by their conduct have constituted themselves trustees.

[LORD HANWORTH M.R. referred to *Clover Clayton & Co.* v. *Hessler & Co.* (4)]

The solicitors claim to have their case tried by a jury, but this, it is submitted, is not a case in which they have a right to have a trial by jury.

[LORD HANWORTH M.R. I think you had better leave Mr. Roxburgh to develop that point.]

R. F. Roxburgh for the defendants Cliffords. In determining whether the issues are "substantially the same" within the meaning of r. 12, the Court has to consider whether in allowing the third party notice it will not thereby be depriving the solicitors of a legal right. If they have an absolute right to a jury, and the effect of the order, if made, will be to deprive them of that right, that is a matter which ought to affect the mind of the judge in deciding whether the issues are "substantially the same" within the meaning of the rule. The Judicature Act contains an express saving of the right to a jury.

It is not suggested that the present action is one which ought to be transferred to the King's Bench Division. The action between the plaintiffs and defendants must be tried in the Chancery Division.

[LORD HANWORTH M.R. The subsidiary issue is one which must be tried in the Chancery Division.]

(1) 25 L. J. (Ch.) 697.
(2) [1897] 1 Ch. 536.
(3) [1893] 2 Q. B. 390.
(4) [1925] 1 K. B. 1.

In the action there is only one issue—namely, whether the defendants Cliffords constituted themselves constructive trustees. The beneficiaries cannot sue the solicitors of the administrators for negligence, and therefore no question of negligence arises. The administrators have here to show that the solicitors constituted themselves trustees, and the relief claimed by them is solely based on breach of trust. The same applies to the question of compensation or indemnity.

The only point which the solicitors desire to have tried by a jury is whether they have committed a breach of their duty towards the administrators.

The gravamen of the charge against the solicitors is that if the annuities had been purchased only out of residue, and not out of the particular fund, the loss would not have fallen on the plaintiffs in the same proportion.

This is a claim which it is submitted the solicitors have a right to have tried by a jury. If an action had been brought by the administrators against the solicitors in the Chancery Division, the solicitors would have had a right to have it transferred to the King's Bench Division.

The solicitors have to show that the action is one which before the Judicature Act could not have been brought in the Chancery Division. The common law liability is based on contract or tort: *Nocton* v. *Lord Ashburton.* (1) It is submitted, therefore, that the solicitors are entitled to have the question of common law negligence tried by a jury and that r. 12 ought to be construed with reference to that right.

[LORD HANWORTH M.R. We think that from their pleadings the solicitors were dealing with these matters in a fiduciary capacity.]

R. H. Hodge, for the plaintiffs, took no part in the argument.

J. N. Gray was not called upon to reply.

LORD HANWORTH M.R. This appeal must be allowed. The interesting part of it arises on the construction of

(1) [1914] A. C. 932.

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Order XVIA., r. 12; but, before I say a word about the construction of that rule, I must first set out sufficient of the facts to enable the point to be made clear. [His Lordship stated the facts and continued:] The administrators took out and served a third party notice upon Messrs. Cliffords. They were enabled to do that without any leave by virtue of r. 12, sub-r. 1, of Order XVIA., which provides that: "Where a defendant claims against another defendant (*a*) that he is entitled to contribution or indemnity, or" —and here we come to two new limbs which are inserted in this rule—"(*b*) that he is entitled to any relief or remedy related to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or (*c*) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant making the claim, and should properly be determined not only as between the plaintiff and the defendant making the claim, but as between the plaintiff and that defendant and another defendant or between any or either of them, the defendant making the claim may without any leave issue and serve on such other defendant a notice making such claim or specifying such question or issue." Having served that third party notice under the rule, there was a summons for directions before Bennett J., and he took the view that in the present case there ought not to be an order allowing that third party procedure to be continued, except with regard to the claim for indemnity or contribution, because he thought that, although it was a case in which there would be a claim for indemnity or contribution, it was not one which came within the wider words of that part of the rule which I have read—namely, clauses (*b*) and (*c*).

It is from the order made by Bennett J. that this appeal is brought. The order that he made was one which is directly limited to the claim to be indemnified against the plaintiffs' claim, or to have contribution in respect of such claim. The administrators who appeal to this Court say

that that order is too narrow; that they claim their right under r. 12, and that Bennett J. has interpreted their right too narrowly, and they ask that there should be an addition —namely, that a third party notice should be added, and that it should be ordered "That such statement of claim," that is, against the defendants to the third party notice, Messrs. Cliffords, "may include also a claim by the said defendants against the third parties for compensation for the loss of the sum of 1878*l.* 19*s.*, mentioned in the third party notice or any part thereof by reason of the breach by the third parties of their fiduciary duty as solicitors for the said defendants as mentioned in the third party notice, and for all accounts and inquiries necessary." Bennett J., for the reasons given in his judgment, came to the conclusion that the defendants who served the third party notice had not made out a case sufficient to justify the application of the powers under Order XVIA., r. 12, sub-r. 1 (*b*) and (*c*).

I pause there for a moment to consider what is the history of this matter. At an early period the rule as to third party proceedings was wider, but it was cut down in consequence of difficulties which arose, and for a long time, certainly more than thirty years, the third party procedure applied only to cases of contribution and indemnity. But recent cases have once more shown that it might be wise to allow third party proceedings in cases which were not merely claims for contribution or indemnity, but also where there was a claim which arose out of the same subject-matter and where to deny that right would be to put the party to the inconvenience of proving over again the same facts for the purpose of getting the remedy to which he was entitled. There is in the books a case of *Clover Clayton & Co.* v. *Hessler & Co.* (1), where a claim was made by certain ship repairers for work and labour done, and a claim made upon those facts against the principals and shipowners. The shipowners said: "Well, if and when we have to pay, we shall be entitled to charge the costs of those repairs upon our underwriters, because the need for the repairs arose from a

(1) [1925] 1 K. B. 1.

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peril of the sea, which our underwriters have insured us against; therefore, if we have to pay, the underwriters will have to pay us." In that case it was held, and affirmed in the Court of Appeal, that the narrow rule regulating third party proceedings did not allow a separate claim under a policy of insurance to be made, even though the same facts would have to be examined over again to establish the liability of the underwriters.

When I come, therefore, to consider the meaning of clauses (*b*) and (*c*) of r. 12, sub-r. 1, I think it is plain that the words "substantially the same" which appear in both those clauses relate to the facts which have to be examined for the purpose of ascertaining what is the relief or remedy to which the parties are entitled. "Substantially" must have been put in in order to embrace within the rule something which was not exactly a repetition of the relief or remedy asked for. I think, therefore, that where the same facts have to be conned over in order to ascertain the liability and to give some relief to one or other of the parties, in such a case the rule now provides that it is unnecessary to have separate actions and separate proceedings, but that a third party notice may be served.

In the present case, upon the admission which is made by the solicitors, it is plain that they received the cheque book with the cheques signed in blank, for the purpose of enabling them to pay on behalf of the co-defendants the funeral and testamentary expenses and debts of the testator. It is charged against them that when once they had been given the authority to deal with the estate in that way, there was something in the nature of a fiduciary duty imposed upon them, for the facts show that they were trusted by their clients not merely to do their duty as solicitors for the purpose of conducting, say, some simple litigation, but for the purpose of giving them advice and piloting them through the difficult matter of the administration of the estate with which the defendant administrators were wholly unfamiliar. It appears, therefore, on the admissions which are made by the solicitors, that there was a fiduciary relationship established between

the defendant administrators, and the defendant solicitors. But I am reluctant to say more upon this point, because I do not, in any way, wish to tie the hands of the learned judge before whom the case must come. It is necessary to decide that the facts of this case are such as enable the defendants to take advantage of the new and wider third party procedure, and to use the notice, which need not now be limited, as Bennett J. has limited it, to contribution or indemnity, but also to cases of other relief based upon the same facts as will emerge at the trial.

The only objection taken to this course is one taken by Mr. Roxburgh, who says that it may be that what may be charged against the defendant solicitors, is a claim in negligence, apart from anything connected with a fiduciary duty. I have some difficulty in laying down a line which divides the duty of a solicitor on the one side or on the other; but let me assume that there is such a line, and that it might be suggested that a common law action of negligence would have lain against the solicitors; then, he says, that if that action had been brought in the King's Bench Division, then, under Order XXXVI., r. 6, the defendants would have been entitled to a jury, whereas if the matter is proceeding in the Chancery Division, there will be no such right. That argument does not impress me, because it must be admitted that this action is properly brought in the Chancery Division. It is an action in which the ancillary remedy of the third party procedure may be rightly adopted, it is one which is excluded from r. 6 of Order XXXVI. by virtue of r. 3 of Order XXXVI., and if it should appear that there was an issue of fact that the judge desired to remit for trial to the King's Bench Division, that procedure could be adopted.

The learned judge will be able to deal with the case and see exactly what was the nature of the duty undertaken by the solicitors, and the liability in respect of it which falls upon them. I do not wish to tie his hands, but the order must be in compliance with the notice of appeal so as to include the claim which is asked for in the notice.

The appeal, therefore, will be allowed, with costs.

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LAWRENCE L.J. I agree. In my judgment, the learned judge has taken too narrow a view of the effect of clauses (*b*) and (*c*) of r. 12, sub-r. 1, of Order XVIA. In the present case the plaintiffs are seeking to have restored to the estate a sum of 1878*l.* 19*s.*, which they allege has been misapplied by the administrators and their solicitors, and, if the plaintiffs are entitled to the relief they seek, the subsidiary question arises, on whom the ultimate loss should fall, whether on the administrators (the defendants Burfords) or on their solicitors (the defendants Cliffords). Without attempting to lay down any general rule as to what claims do or do not come within the scope of r. 12, sub-r. 1, of Order XVIA., in my judgment the present claim is essentially one which comes within that scope. The whole of the facts upon which the ultimate liability depends will necessarily have to come out on the trial of the issue between the plaintiffs and the defendants, and no further facts will have to be proved to determine the liability as between the defendants inter se. The learned judge seems to have thought that he was precluded from allowing the third party procedure to continue, because the issues which arise between the defendants inter se are not substantially the same as those which arise between the plaintiffs and the defendants. The words "substantially the same," should, I think, be interpreted as "the same in substance although not in form," because it is impossible that the issues between the defendants inter se should ever be the same in form as those between the plaintiffs and defendants. The claim by a defendant against his co-defendant must necessarily be a different claim from that of the plaintiff against the defendants. What I think is meant by the rule is that if the claim made by a defendant against his co-defendant is connected with the claim which the plaintiff makes against both defendants, and is one which in the event of the plaintiff being successful will determine which of the two defendants ought to bear the ultimate loss, it is one in which the claim made by the defendant against his co-defendant is substantially the same as that made by the plaintiff against both the defendants within

the meaning of the rule. In my judgment, therefore, the learned judge was wrong in holding that this case did not come within the provisions of r. 12, sub-r. 1.

Mr. Roxburgh has stated, quite frankly, that the ground upon which the learned judge decided the case in his favour was not the ground upon which he had urged the Court below not to make an order on the summons for directions. He stated that his sole ground, both in the Court below and in this Court, was that this case did not come within the provisions of the rule, because the claim by the administrators against their solicitors was a claim for damages for negligence, and that if an action had been brought by the defendants Burford against the defendants Clifford for negligence as solicitors, the latter would have been entitled to have the issue of negligence determined by a jury. It may well be that, if such an action had been brought in the King's Bench Division, the defendants Cliffords might have claimed a jury as of right, and possibly, if such an action had been brought in the Chancery Division, they might have obtained an order to transfer it to the King's Bench Division in order that it might be tried before a jury. In the present case, however, no such action has been brought, and therefore we have not to consider what would have happened if it had been brought. What we are dealing with here is a third party notice raising a claim between co-defendants under Order XVIA. in an action rightly brought in the Chancery Division. Moreover, the claim made by the defendants Burfords against the defendants Cliffords is not one purely for damages for negligence; it includes a claim for the breach of the fiduciary duty, alleged to have been undertaken by the defendants Cliffords, of administering a fund which was placed under their control by the administrators. It is quite possible that the trial of that claim may involve the consideration of the question whether the Cliffords have committed a breach of their common law duty as solicitors; but the only question which the defendants Burfords by their notice of appeal ask to have decided is their claim against the defendants Cliffords for

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compensation in respect of the breach of the fiduciary duty alleged to have been undertaken by them. I want, however, to guard myself against it being suggested that in the trial of that claim no evidence tending to prove that the defendants Cliffords had negligently advised the administrators should be admitted or given effect to. In the third party notice the breach of duty complained of has been tabulated under three heads—namely, (1.) that the said sum was by the testator's will given to the plaintiffs and the defendant George Henry Burford; (2.) that it was the duty of the defendants Cliffords to advise the defendants Burfords that the sum ought to be paid to the legatees and not to be invested or otherwise dealt with; and (3.) that the sum was paid by the Cliffords to Wheeler & Co. contrary to the express directions of the defendants Burfords. In my opinion, all those questions, including any question of negligence, ought to be decided in this action, so as finally to determine upon which of the parties to the action the loss occasioned by the fraud of Wheeler & Co. ought to fall.

For these reasons I agree that the appeal ought to be allowed.

ROMER L.J. With great respect to Bennett J., I think he has taken too narrow a view of the new rule, Order XVIA., r. 12. It appears to me that this case is just one of those with which the new rule was intended to deal. It is quite plain that at the trial of this action all the circumstances in which the blank cheques were placed in the control of the solicitors by the administrators, and the circumstances in which the particular cheque in favour of Arthur Wheeler & Co. was filled up by the solicitors and handed to them, with the result that we know, will have to be investigated. When the facts have been investigated, it may appear that the loss of the money has been occasioned by a breach by all the defendants of a fiduciary duty owed by them to the plaintiffs. But it may also appear that the loss was really occasioned by the breach of a fiduciary duty which the defendant solicitors owed to the defendant administrators,

and the latter accordingly seek, by means of their third party notice, to obtain an order from the Court which will throw the whole responsibility for the loss upon the solicitors. That being so, this is a case where the defendant administrators claim that they are entitled to some relief or remedy as against the defendant solicitors ; and such relief or remedy is so connected with the original subject-matter of the action, being substantially the same as the relief or remedy which is claimed by the statement of claim, that, in my opinion, we ought to make the order such as is asked for by the notice of appeal, with the consequences that have been stated.

I only desire to add, with regard to the argument of Mr. Roxburgh, that, when the issues arising on the third party notice are tried, a question may arise which is substantially the same as the question whether his clients have been guilty of what is called common law negligence, but the mere fact that it may arise is no reason why, in the circumstances of this case, we should not make an order on the third party notice such as is asked for by Mr. Gray.

Appeal allowed.

Solicitors : *Peacock & Goddard, for Moody & Woolley, Derby ; Peachy & Co., for H. B. Clayton & Sons, Nottingham.*

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In re RECKITT.

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[1932. R. 274.]

Will—Annuity—Direction to pay "free of income tax"—Whether given free of sur-tax.

By his will dated November 12, 1924, a testator, after appointing executors and trustees, and giving certain specific and pecuniary bequests, bequeathed to his trustees the sum of 200,000*l.* upon trust to invest the same in any of the investments thereinafter authorized, and to hold the said investments upon trust thereout to pay his wife during her life the annual sum of 5000*l.* "free of income tax":—

Held (affirming Eve J.'s decision), that the wife was entitled to the annual sum free of sur-tax as well as of ordinary income tax.

In re Crosse [1920] 1 Ch. 240 and *In re Doxat* [1920] W. N. 262 approved. *In re Bates* [1925] Ch. 157 distinguished.

Dicta in *Lord Michelham's Trustees* v. *Inland Revenue Commissioners* (1930) 15 Tax Cas. 737, 750, 751 followed.

Appeal from Eve J.

By his will dated November 12, 1924, Sir Harold James Reckitt, after appointing executors and trustees and giving certain specific and pecuniary bequests, provided in clause 12 as follows: "I bequeath to my trustees the sum of 200,000*l.* upon trust to invest the same in any of the investments hereinafter authorised and to hold the said investments upon trust thereout to pay my wife during her life the annual sum of 5000*l.* free of income tax . . . . subject to the said annuity of 5000*l.* my trustees shall hold the said sum of 200,000*l.* and the investments for the time being representing the same upon trust to pay the income thereof to my daughter Nancie during her life and subject thereto upon the same trusts as are hereinafter declared in respect of my residuary estate."

The testator bequeathed his residuary estate upon trusts for the benefit of this daughter Nancie and her issue.

The testator died on December 29, 1930, without having revoked or altered his will save by a codicil the contents of which were not material.

It was stated in evidence that the approximate amount available for payment of all pecuniary legacies would be about 210,000*l.*, whilst the aggregate amount of these legacies was about 273,000*l.*

A summons was taken out by two of the trustees of the testator's will to have it ascertained (inter alia) whether the annual sum of 5000*l.* payable to the testator's widow, the defendant, Dame Julia Allen Reckitt, was payable free of sur-tax.

Eve J. decided that the annuity was payable free of sur-tax. The persons interested in the legacy of 200,000*l.* other than the annuitant appealed.

Gavin Simonds K.C. and *L. F. Potts* for the appellants. It is admitted that for certain purposes sur-tax is an additional income tax, but here the direction in the will is to pay the sum of 5000*l.* free from a payment to which it would otherwise be subjected in the hands of the trustees—namely, the standard rate of income tax: see rr. 19 and 21 of the All Schedules Rules to the Income Tax Act, 1918. The question has never before been decided in this Court, and there is a considerable difference in the decisions by judges of first instance. In *In re Crawshay* (1) the gift was of an annuity "clear of all deductions including income tax" and it was held that the annuitant was not entitled to payment of any sum in respect of super-tax. In *In re Doxat* (2) the gift was "free of income tax and of all other deductions," and Sargant J. took a contrary view. Again in *In re Crosse* (3), where the gift was of a clear annual sum "free from income tax," Astbury J. held that the annuitant was entitled free of super-tax as well as ordinary income tax, while in *In re Bates* (4) a gift of "such a sum in every year as after deduction of the income tax for the time being payable in respect thereof will leave a clear sum of 2000*l.*" was held only to give a right to receive the sum free of ordinary income tax.

(1) [1915] W. N. 412.
(2) [1920] W. N. 262.
(3) [1920] 1 Ch. 240.
(4) [1925] Ch. 157.

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[LORD HANWORTH M.R. referred to *Inland Revenue Commissioners* v. *Longford.* (1)]

A direction to pay an annual sum free of income tax must be construed as a direction to pay it free of the income tax payable in respect thereof, and the only income tax payable in respect thereof is the standard rate of income tax that the trustees themselves pay and would but for the direction retain out of the annuity. In *In re Bates* (2) it was not necessary for Russell J. to express disagreement with Astbury J.'s decision in *In re Crosse* (3), because the words to be construed were different. It is difficult to infer from a direction to pay free of income tax not only that payment shall be made without deducting tax at the standard rate but also that payment was to be made over and above the sum of 5000*l.* of a sum which could only be ascertained by a very artificial calculation. As a matter of administrative convenience a decision that this is the intention is undesirable. This is a matter to which weight can be attached: compare *In re Wedgwood.* (4) In *In re Bowen* (5) the gift was of an annuity to be paid "without any deduction by equal quarterly payments free from income tax." That was held to entitle payment free of super-tax.

It is contended that the Court should now take a different view as to the meaning of "free of income tax." *In re Hulton* (6) was not of any real assistance in this case, the only question being whether a direction to pay free of super-tax applied to sur-tax, and it was held that it did. In *Lord Michelham's Trustees* v. *Inland Revenue Commissioners* (7) there are undoubtedly dicta of the Court of Appeal which are opposed to the appellants' contention, but there had in that case been an earlier decision on construction that the annuity in question was payable free of income tax and super-tax. It is contended that this is not the case here, as matter of construction. It is to be noted that here there is no gift of the annual sum apart from the direction to pay it, and a

(1) [1928] A. C. 252.
(2) [1925] Ch. 157.
(3) [1920] 1 Ch. 240.
(4) [1921] 1 Ch. 601, 618.
(5) [1925] W. N. 206.
(6) [1931] 1 Ch. 77.
(7) (1930) 15 Tax Cas. 737, 750, 752.

direction to pay a sum free of income tax can only apply to something which but for the direction would be a proper deduction. *Fleetwood-Hesketh* v. *Fleetwood-Hesketh* (1) shows how provision should be made for payment of super-tax or sur-tax.

Vaisey K.C. and *W. M. Hunt* for the respondent were not called upon.

Roger Turnbull for the plaintiffs.

LORD HANWORTH M.R. In this case Eve J. has held that a direction given to trustees to pay an annuity to the widow of the testator free of income tax was a direction to pay her free, not only of income tax, but also of what is now known as sur-tax. The will we have to consider is the will of Sir Harold James Reckitt, made on November 12, 1924. His death took place on December 29, 1930. Clause 12 of his will reads as follows: "I bequeath to my trustees the sum of 200,000*l.* upon trust to invest the same in any of the investments hereinafter authorised and to hold the said investments upon trust thereout to pay my wife during her life the annual sum of 5000*l.* free of income tax." There are no further directions that are relevant. There is no direction to pay in quarterly payments, or equal quarterly payments, there is no reference to deductions; there are simply the words "pay my wife during her life the annual sum of 5000*l.* free of income tax." Eve J. has held that the freedom so prescribed included freedom from sur-tax as well as income tax. The appellants, who have presented to us very useful and helpful arguments, contend that those words ought to be confined to income tax alone, and cannot be made to cover the sur-tax. I am not unmindful that a distinction between what is now known as sur-tax, formerly super-tax, and income tax can be drawn. Sur-tax was introduced by the Finance Act, 1927, s. 38, sub-s. 1 (*b*). Although the name is different I agree with Bennett J., who said in *In re Hulton* (2), after going very carefully through the provisions relative to the matter: "In every essential feature super-tax and sur-tax are, in my judgment, the same

(1) [1929] 2 K. B. 55. (2) [1931] 1 Ch. 77, 84.

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tax." Now what is super-tax? It was originally imposed by the Finance (1909–10) Act, 1910, s. 66. By sub-s. 1 it is declared that: "In addition to the income tax charged at the rate of . . . . under this Act, there shall be charged, levied, and paid for the year . . . . in respect of the income of any individual, the total of which from all sources exceeds" a certain standard, "an additional duty of income tax (in this Act referred to as a super-tax)." Those words are reproduced now in s. 4 of the Income Tax Act, 1918. The relevant words are exactly the same: "an additional duty of income tax (in this Act referred to as super-tax)." The question arose whether or not, for the purposes of the collection of super-tax, it was possible to rely upon the statutory provisions relating to the collection of income tax. *Bowles* v. *Attorney-General* (1) was decided by Parker J., and the question arose whether the Customs and Inland Revenue Act, 1890, s. 30, enured for the purpose of the super-tax, and Parker J. said, during the argument: "Is not s. 30 of the 1890 Act kept in operation for the purpose of collecting super-tax in due time?" Parker J., in giving judgment, said (2): "The only question I have to decide in this action is whether this section applies not only to ordinary income tax, but to super-tax as well. In other words, I have to determine whether super-tax is a 'duty of income tax' within the meaning of this section"; and he held that it was. He so held, in spite of a differentiation which it is not difficult to make, and which has been forcibly presented to us in the argument for the appellants. It is said that it is not the income tax for the year, it is an additional tax. It is said, quite truly, that for the purposes of super-tax there is a duty cast upon every person chargeable therewith to give notice that he is chargeable to it, so that the initiative lies upon the subject, while in the case of income tax the assessment is made upon him by the surveyor. More than that, by sub-s. 6 of s. 7 it was necessary to declare that: "All provisions of this Act relating to persons who are to be chargeable with income tax, and to income tax assessments, and to appeals

(1) [1912] 1 Ch. 123. (2) [1912] 1 Ch. 134.

against those assessments, and to the collection and recovery of income tax, ... shall, so far as they are applicable, apply to the charge, assessment, collection, and recovery of super-tax." Therefore it can be said that super-tax is an additional income tax, although its incidence, the mode of its initiation, and the mode of its collection, are different. I pointed out in the *Michelham* case (1) that: "The fact that it is paid or may be paid a little differently from the income tax, that deduction does not apply, does not alter its character." The consideration, therefore, of the nature of super-tax seems to disclose that, in spite of the matters differentiating it from income tax, the fact remains that it is an additional duty of income tax within the statutes that I have referred to.

I feel myself, therefore, unable to recognize any distinction between income tax and super-tax when construing the words "income tax," as used in clause 12 of the testator's will. I am not unmindful of the inconvenience which this decision will cause to those who have to fulfil the duty cast upon them as trustees by this direction of the will. Mr. Potts has pointed that out quite plainly. It is easy to carry out the direction to pay free of income tax, because income tax would otherwise have to be deducted; but the duty of paying free of super-tax can only be carried out in quite a different and much more burdensome manner. In spite, however, of a desire, from considerations of convenience, to hold that the annuity is given free only of income tax, and not of super-tax, I find it impossible to disregard the authority to which I have referred or the sequence of phrases in the statutes.

I come now to consider the authorities. We have been referred to three or four authorities decided upon this point. Peterson J. in *In re Crawshay* (2) held that the phrase "clear of all deductions, including income tax" did not include super-tax. The nature of super-tax is that it is paid upon an assessment made by the assessor, it is not paid by deduction, and rr. 19 and 21 of the All Schedules Rules do not apply. Thus, where a reference is made to a "deduction," indicating that the freedom which is to be allowed is in regard

(1) 15 Tax Cas. 737, 750. (2) [1915] W. N. 412.

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to a deduction in a case to which the system of deduction applies, the Courts may come to the conclusion that super-tax is not included. The words, "clear of all deductions," do not, however, occur here.

Then comes *In re Doxat* (1), in which Sargant J. took a different view. The words that had to be considered in that case were: "I give to my said wife an annuity of 2500*l.* during her life, free of income tax and of all other deductions." There Sargant J. held, refusing to treat the words as to deductions as diminishing the force of the previous words, that the widow was entitled to the amount of the annuity free from income tax, and super-tax. But it will be observed in both those cases that close attention was directed to the actual words used in order to determine what was the meaning of the direction given in the will.

Then comes the judgment of Russell J. in *In re Bates.* (2) In that case there was a gift to the wife of "such a sum in every year as after deduction of the income tax for the time being payable in respect thereof will leave a clear sum of 2000*l.*" Russell J. held that the gift was free of income tax only, and that the wife was not entitled to payment of any sum in respect of super-tax. He founded his judgment upon the reference to "deduction," and pointed out (3): "Super-tax was not a charge in respect of any particular annuity or sum, but was a charge in respect of the recipient's whole income and was not a matter with which the trustees would be charged or concerned at all." He is dealing there with the judgment of Peterson J. in *In re Crawshay* (4), and afterwards he puts the question in this way (5): "The question is, did the testator mean that only income tax 'in respect thereof' was to be deducted, and that super-tax was not to be deducted." He then holds that: "The testator did not intend that in addition to income tax being deducted a proportion of the super-tax payable by his wife in respect of her total income should also be deducted." In the use of

(1) [1920] W. N. 262.
(2) [1925] Ch. 157.
(3) [1925] Ch. 159.
(4) [1915] W. N. 412.
(5) [1925] Ch. 161.

the words : " such a sum in every year as after deduction of the income tax for the time being payable in respect thereof will leave a clear sum of 2000*l.*" there is to be found a restrictive indication.

But in the present case the trustees are simply directed to hand over a sum of 5000*l.* in each year free of income tax. As I have already pointed out, it is not prescribed in what instalments that sum is to be paid. No reference is made to the system of, or the power of the trustees to make, deductions ; there is simply a direction that a total sum in each year is to be paid free of income tax. As I have pointed out, super-tax or sur-tax is in essence an additional income tax, and, as there is no indication to restrict the words to income tax as known for so many years, it must follow that freedom is given to the widow in respect of both income tax, as we know it, and the additional income tax which has now been given the name of sur-tax.

For these reasons I feel bound to agree with Eve J., who has followed the sequence of authorities to which I have referred, and also, I think, the indication of opinion given by this Court in the *Michelham* case. (1) In these circumstances the appeal fails, and must be dismissed.

LAWRENCE L.J. This case raises the question whether a direction to pay an annuity free from income tax includes freedom from super-tax, or sur-tax, a question which, so far as Courts of first instance are concerned, has been settled for upwards of ten years. I refer to the case of *In re Crosse* (2), which was decided by Astbury J. in 1920, and the case of *In re Doxat* (3), decided by Sargant J. in the same year.

Mr. Gavin Simonds, on behalf of the appellant, relied upon the decision of Russell J. in *In re Bates* (4) given in 1924. It is important to observe what were the words of the will in that case. It was not a gift of an annuity free from income tax, as in the present case, but a gift of " such a sum in every year as after deduction of the income tax for the time being

(1) 15 Tax Cas. 737, 750.
(2) [1920] 1 Ch. 240.
(3) [1920] W. N. 262.
(4) [1925] Ch. 157.

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payable in respect thereof will leave a clear sum of 2000*l.*" The learned judge, at the outset of his judgment, expressly stated that the testator had not said that the annuitant was to be paid her annuity free from income tax, and he referred in his judgment both to *In re Crosse* (1) and *In re Doxat* (2), and distinguished those cases on the ground that there the gift was of an annuity free from income tax. He then proceeded to consider the words which he had to deal with, and came to the conclusion that, on the construction of the particular bequest, the freedom from income tax did not include freedom from super-tax, relying (inter alia) upon the words "in respect thereof" occurring in the bequest, and pointing out that super-tax was not strictly speaking a tax payable in respect of the annuity.

Mr. Gavin Simonds, however, contended that a gift of an annuity free from income tax must necessarily mean a gift of an annuity free from income tax payable "in respect thereof," and that, therefore, the reasoning of Russell J. in *In re Bates* (3) ought to be applied to the present case; but it is to be observed that the learned judge in that case relied upon the express use of the words "in respect thereof" as distinguishing the case from the case of a gift such as we have here.

I have said that the question was settled, so far as the Courts of first instance were concerned, but the matter does not quite rest there. In the *Michelham* case (4) there was a gift of an annuity free from income tax simpliciter. Although the question was not argued, the Master of the Rolls stated in his judgment (5), with regard to the liability in respect of super-tax: "The liability it appears to us is clear. The fact that it is paid or may be paid a little differently from the income tax . . . . does not alter its character." Slesser L.J. agreed with the Master of the Rolls. Romer L.J. said (6): "The testator has also directed that the annuity shall be paid free of super-tax, and it was so held by the Court of

(1) [1920] 1 Ch. 240.
(2) [1920] W. N. 262.
(3) [1925] Ch. 157.
(4) 15 Tax Cas. 737.
(5) Ibid. 750.
(6) Ibid. 751.

Chancery, and, in my opinion, was rightly so held," thus expressing his approval of the decision that a gift of an annuity free from income tax is a gift of an annuity which carries with it freedom from super-tax, and therefore agreeing with what had been settled by the Courts of first instance.

In my judgment (quite apart from the question whether it is open in this Court or not) the decisions in *In re Crosse* (1) and in *In re Doxat* (2) were right, and no distinction can be drawn in the present case between income tax, properly so called, and super-tax, or sur-tax, both the latter being, in fact, additional income tax, and, therefore, included in the words "income tax."

For these reasons I agree that the appeal fails, and ought to be dismissed.

ROMER L.J. I agree. For the reasons given by the Master of the Rolls it is, in my opinion, clear that, prima facie, the words "income tax" include super-tax. Therefore it seems impossible to contend that where you find simpliciter a gift of an annuity free of income tax, that is not a gift of an annuity free of income tax and super-tax; it is, indeed, a gift to the annuitant of such a sum as will, after all questions as between the annuitant and the Crown in respect of income tax and super-tax for that year have been settled, leave the annuitant with the sum mentioned. Of course, somebody has to pay the annuity, and the person who has to pay it will have to see that he pays, whether he be a trustee, or anybody else, such a sum as I have mentioned. If, therefore, in any particular year the annuitant has had to pay something in respect of super-tax on the annuity, by which I mean a sum calculated in the way indicated in the statute, the person whose duty it is to carry into effect the gift of the annuity will have to pay, not only the sum that is mentioned in the gift, but also the amount of super-tax paid or payable by the annuitant that year in respect of the annuity. If that is so, I cannot conceive why it should make any difference that the gift of the annuity is only to be found in a direction to a trustee to

(1) [1920] 1 Ch. 240. (2) [1920] W. N. 262.

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pay. The trustee, in that case, has to perform precisely the same duty as the executor or trustee, or other person, would have had to perform in the case of a gift simpliciter of an annuity free of income tax, that is to say, to pay it free of income tax and super-tax. There are, of course, cases—the Master of the Rolls has referred to some of them—where the testator, by the use of such words as "pay without deduction," has shown that he is dealing not with the position as between the annuitant and the Crown, but with the position as between the annuitant and the trustee who has to pay; and a direction "to pay without any deduction" indicates that the testator is providing against a deduction by the trustee which, but for the provision, the trustee would be entitled to make. Inasmuch as the trustee, in the absence of such words, is not entitled to make any deduction in respect of super-tax, it is plain that the testator, although referring to income tax, does not intend to include in those words the super-tax.

For these reasons I think that this appeal fails, and should be dismissed.

Appeal dismissed.

Solicitors: *Gerald & Arthur Marshall; Slaughter & May; Nicholl, Manisty & Co.*

H. C. G.

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May 11, 12, 13.

[1932. S. 464.]

Local Government—Highway—Dedication—Trees on Highway—Vesting of "streets" in Urban Authority—Public Danger and Obstruction—Power of Authority to remove Trees—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 149.

As owner of "The Limes" at Clewer, which were bounded on the west and north by public highways known as Mill Lane and St. Andrew's Road respectively, the plaintiff claimed the property in certain polled lime trees, proved to be about 110 years old, standing along the edge of the footpaths on the eastern and southern sides of those two highways. The plaintiff having refused to comply with the defendants' notice to remove the trees on the ground that they were dangerous and obstructions to traffic and the defendants having, in consequence of her refusal, themselves removed three of the trees in St. Andrew's Road, the plaintiff brought this action, by which she claimed an injunction to restrain the defendants from removing the remaining trees and for certain other relief.

She claimed that the trees had been planted before the dedication of the roads as public highways, and that there had been excepted from such dedication the portions of the roads in which the trees were planted. There was no evidence of such restricted dedication as the plaintiff asserted, but, on the contrary, evidence that the trees in both roads were planted in areas over which, as ancient highways, the public had rights of passage.

It was proved that some of the trees were, through disease and decay, so unstable as to be an immediate danger to the public and a nuisance to the highway, that others threatened to become a similar danger at short notice, and that the rest, including the three trees which the defendants had removed, were a danger to traffic and a nuisance.

On August 16, 1920, the boundary of the borough of New Windsor was altered so as to include the parish of Clewer (Without), and it was admitted that the two roads were highways repairable by the inhabitants at large:—

Held, first, that the roads were ancient highways upon which, after dedication to the public use, the trees were planted. Secondly, that, even assuming the plaintiff had property in the trees, the defendants, as to those trees which had been proved to be a nuisance to the highway, had not merely a right but a duty to remove them, and as to the remaining trees, they were entitled to remove them as being obstructions to the rights of the public over the entire width of the roads, which were not limited to the use of the carriageways. Lastly, that the trees, as being parts of the "streets" or as produce of the soil thereof, vested under s. 149 of the Public Health Act, 1875, in and came under the control of the defendants as the highway authority, with the result that the plaintiff was not in a position to complain, and her action failed.

Coverdale v. *Charlton* (1878) 4 Q. B. D. 104 discussed and applied.

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WITNESS ACTION.

Mrs. Anne Stillwell, who was the owner in fee simple of the dwelling-house and garden known as "The Limes" in the parish of Clewer, brought this action for an injunction to restrain the defendants, the New Windsor Corporation, from committing a trespass upon what she claimed as her property—namely, by cutting down and removing certain trees standing on those parts of St. Andrew's Road and Mill Lane which bounded "The Limes" on the north and west sides thereof respectively, and further or in the alternative for damages and for damages in respect of the wrongful removal by the defendants of three of her trees from St. Andrew's Road.

The plaintiff's house fronting westward was situate on the east side of Mill Lane, which diverges northward out of the main road from Windsor to Maidenhead. The lane was narrow, varying in width from 16 to 23 feet. There was a footway varying in width between 6 feet and 8 feet 6 inches along the east side of the lane between the wall which bounded the plaintiff's property on the western side and nine lime trees which stood on the line separating the footway from the carriageway. Passing those nine trees a spot is reached at the northern end of Mill Lane where St. Andrew's Road coming from the east forms a right-angled corner with the lane. Passing out of the lane eastward along St. Andrew's Road, there would be found two lime trees standing on the edge (nearest the carriageway) of the footway running parallel with and adjoining the plaintiff's northern boundary wall.

Before their removal by the defendants, as hereinafter stated, there were three other lime trees standing in a line with the two before mentioned trees, and in a similar position. The width of the carriageway in St. Andrew's Road opposite the two remaining trees was about 14 feet only, and its width opposite the three trees which had been removed was about 17 feet.

On April 7, 1931, the defendants in their capacity of highway authority for the borough of New Windsor, purporting to

act in pursuance of s. 64 of the Highway Act, 1835, served on the plaintiff a notice requiring her to remove the trees, on the ground that they were a danger and an obstruction to the public in their user of those roads. The plaintiff having treated the notice as irregular and declined to obey it, the defendants on February 1, 1932, cut down and removed three of the five trees which were then standing in St. Andrew's Road; whereupon the plaintiff issued the writ in this action and obtained an interim injunction against the defendants. The motion was renewed on May 11 and, by consent, was treated as the trial of the action.

Oral evidence was given at the trial, which proved to the satisfaction of the Court, that the trees, which were lime pollards, were about 110 years old, that the two trees at the northern end of Mill Lane and the two trees left standing in St. Andrew's Road, those four trees being close to the corner at the northern end of Mill Lane formed by the junction of the two roads, were and also the three trees which had been removed by the defendants until their removal were a serious hindrance to the traffic on those two roads, more especially on the days on which the Windsor races were held, and that one of those four trees and also two of the other seven trees in Mill Lane were so decayed by disease as to be an immediate source of danger to the public using the roads. As regards those six trees Clauson J. found that they constituted a nuisance to the highways and that, as regards the three trees which the defendants had removed, they also were, until their removal, a nuisance to the highway. As to the remaining five trees in Mill Lane, Clauson J. found, on the evidence before him, that, although they might not be an immediate danger, they might well become dangerous at short notice.

On August 16, 1920, an Act was passed which confirmed a previous Order made by the Ministry of Health by which the boundary of the borough of New Windsor was altered so as to include the parish of Clewer, at which date, as it was admitted by counsel on both sides, the two roads were repairable by the inhabitants at large.

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It was proved and found by the Court that the trees in both roads were planted in areas over which, as ancient highways, the public had rights of passage.

G. R. Upjohn for the plaintiff. It must be presumed that the trees are lawfully on the two highways. They have been proved to be 110 years old, and must have been planted before any dedication of the roads to the public use. Dedication must have been made subject to the existence of the trees or, in other words, there must have been excepted from the subject-matter of dedication those portions of the two roads which are occupied by the trees. The owner of the soil of the roads, ad medium filum, upon dedication thereof, parted with no other rights than a public right of passage over those portions of the roads which were dedicated : *Fisher* v. *Prowse*. (1) Upon the proper construction of s. 149 of the Public Health Act, 1875 (2), the trees did not vest in the defendants. The trees were not there for the purposes of "the street." Special powers are conferred by s. 43 of the Public Health Acts Amendment Act, 1890, to the urban

(1) (1862) 2 B. & S. 770.

(2) Sect. 149 : "All streets, being or which at any time become highways repairable by the inhabitants at large within any urban district, and the pavements stones and other materials thereof, and all buildings implements and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority.

"The urban authority shall from time to time cause all such streets to be levelled paved metalled flagged channelled altered and repaired as occasion may require; they may from time to time cause the soil of any such street to be raised lowered or altered as they may think fit, and may place and keep in repair fences and posts for the safety of foot passengers.

"Any person who without the consent of the urban authority wilfully displaces or takes up or who injures the pavement stones materials fences or posts of or the trees in any such street shall be liable to a penalty not exceeding five pounds, and to a further penalty not exceeding five shillings for every square foot of pavement stones or other materials so displaced taken up or injured ; he shall also be liable in the case of any injury to trees to pay to the local authority such amount of compensation as the court may award."

By s. 6 of the Act, the defendants, the Mayor, Aldermen and Burgesses of the Borough of New Windsor were, acting by the Council, the urban authority of the borough, and by s. 144 every urban authority is made, within its district, surveyor of highways.

authority to plant trees in highways repairable by the inhabitants at large.

[CLAUSON J. Wilful injury to trees in a street, whether planted by the urban authority or not, is dealt with in the third paragraph of s. 149 of the Act of 1875.]

"Streets" which were vested by s. 149 in the urban authority did not include the trees which, in virtue of the adjoining property, were vested in the owner of the soil of the roads ad medium filum and which were not included in the dedication of the roads. The roads here in question vested under s. 149 qua "streets." The space and the streets themselves, but only so far as they are ordinarily used in the way that a street is used, vested in the defendants: *Coverdale* v. *Charlton.* (1) Bramwell L.J. in that case expresses doubts whether any property in trees in a street vested in the urban authority.(2) "'Street' . . . . includes the surface and so much of the depth as may be not unfairly used, as streets are used": per Brett L.J. (3) In *Rolls* v. *Vestry of St. George the Martyr, Southwark* (4), it was held that the property in a street vested under the section only so long as the ground continued to be a street. There is vested under the section only such property in a street as is necessary for the control, protection and maintenance of the "street" as a highway for public use: *Mayor, &c., of Tunbridge Wells* v. *Baird.* (5) The action of the defendants in requiring the removal of the trees is unreasonable and arbitrary: *Howard-Flanders* v. *Maldon Corporation.* (6)

Charles Harman for the defendants. If, having regard to modern conditions of traffic, some of the trees have become a danger or an obstruction to the public in their legitimate use of the roads, the defendants, as the highway authority, have a right, indeed a duty, to remove the danger or obstruction and abate the nuisance to the highway, even though the trees had been standing in their places at the time of the

(1) 4 Q. B. D. 104, 117.
(2) Ibid. 117.
(3) Ibid. 121.
(4) (1880) 14 Ch. D. 785.
(5) [1896] A. C. 434, 442.
(6) (1926) 135 L. T. 6.

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dedication of the roads to the public use, and the dedication had been made subject to the trees thereon. The roads were highways repairable by the inhabitants at large, and when in 1920 the parish of Clewer in which the roads were situate was taken into the borough of New Windsor, the trees vested in the defendants under s. 149 of the Public Health Act, 1875. As to the extent of the rights of the defendants in the roads: the roads and their surface vested in them some property in the soil for the purposes for which they were to be used: *Coverdale* v. *Charlton.* (1) Property in a street passes to a certain depth, which may be called "the area of user"; the area of the ordinary user, which is usually needed for the ordinary works which are done in a street: *Wandsworth Board of Works* v. *United Telephone Co.* (2); *Finchley Electric Light Co.* v. *Finchley Urban Council.* (3) It is the duty of the defendants to protect the public against danger and obstructions to the highway. The public have a right of passage over the entire width of the road free from obstructions, including those portions of the surface which are occupied and obstructed by the trees, and it is the duty of the defendants to remove such obstructions: *Turner* v. *Ringwood Highway Board.* (4)

The trees being a danger and obstructions to the highway the defendants, on behalf of the public, are entitled to remove them on giving reasonable notice: *Bagshaw* v. *Buxton Local Board of Health.* (5) The duty of the highway authority to keep the public highway in a state fit to accommodate the ordinary traffic must vary according to the expansion or changes in the character of the traffic: *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General.* (6) A highway authority were even allowed the costs of an indictment for an obstruction to the highway, as expenses incurred in maintaining the highway: *The Queen* v. *Heath.* (7)

(1) 4 Q. B. D. 104, 117.
(2) (1884) 13 Q. B. D. 904, 913.
(3) [1903] 1 Ch. 437.
(4) (1870) L. R. 9 Eq. 418.
(5) (1875) 1 Ch. D. 220.
(6) [1915] A. C. 654, 665.
(7) (1865) 6 B. & S. 578; L. R. 1 Q. B. 218.

CLAUSON J. [stated the facts and his view of the result of the evidence as to the danger to the public threatened by the trees and the obstruction caused by them to the traffic on the two roads, and proceeded as follows:] It is admitted by the plaintiff and agreed by the defendants that St. Andrew's Road, at all events to a point rather beyond that at which the easternmost of the three trees stood which have been removed, and also Mill Lane are highways repairable by the inhabitants at large. So far as any evidence before me is concerned, I have no reason to doubt that they have existed as public highways for very many years, for a period to which no evidence has been forthcoming which enables me to put a limit.

The plaintiff claims that she has a right to complain of the highway authority having cut down the three trees which have been cut down, and that she has a right to prevent the highway authority from removing the nine trees which I have mentioned in Mill Lane, and the two still remaining trees in St. Andrew's Road.

In my view, the defendants, as the highway authority, subject to and apart from the question of the plaintiff's rights, a question with which I will deal later, were justified, in the exercise of the duty which lay upon them, to keep these highways in a proper condition for public traffic, in removing the three trees which they themselves did remove in St. Andrew's Road: and they would now be justified in removing the eighth and ninth trees in Mill Lane, near the corner formed by the junction between Mill Lane and St. Andrew's Road, as being an interference with safe transit round that corner; and they would be justified in removing the second and third trees in Mill Lane counting from the south end thereof on the ground of their instability, those trees being dangerous from that point of view. With regard to the remaining trees, circumstances may very soon arise, it may be within a period of months or it may not be for two or three years, which may make those trees trees which it would be the duty of the defendants to remove in the exercise of their duty as highway authority or in the interest of the public.

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The plaintiff, however, claims the right to prevent the removal of the trees, and I must consider the grounds upon which she bases that right and decide whether her claims are valid. The first way in which the case is put is this: It is said that, from the evidence before me, I ought to hold that, whereas it would appear that the highway in Mill Lane extended from the wall of the plaintiff's house on the east to the wall of the opposite house on the west, that is not the true position, but that Mill Lane consists of a carriageway—I disregard for the moment the footway on the west, with which I am not concerned—reaching up to the lime trees and a footway lying between the trees and the plaintiff's property, that between the carriageway and the footway there is either a narrow strip of ground along which the trees are planted or there are pieces of ground on which the trees are planted which have never been part of the highway, that is to say, have never been dedicated as part of the highway, and that, accordingly, those nine trees—so it has been contended—occupy portions of ground which do not form parts of the highway at all, and in which the public and the highway authority have no interest, except such interest as may arise from their right to object to something of the nature of a nuisance on or adjoining the highway. That is an attractive hypothesis in the interest of those who wish to preserve rights in the trees; but on the evidence I come to the conclusion that I can hold nothing of the kind.

In my judgment, upon the evidence, I have no course open to me, except to assume that Mill Lane is an ancient highway, and that the presence of those trees in Mill Lane is accounted for by the fact that the road authority, with the consent of the owner of the soil, whoever he was at the time, placed those trees in the roadway as a convenience and amenity for the roadway for the purpose of shade or of forming a living fence marking off the footway from the carriageway. Or possibly the owner of the soil, with the permission of the road authority, planted those trees as an amenity or for his own purposes in the highway, either by leave or with the acquiescence of the highway authority.

Those trees are admittedly not more than 110 years old, and I have no reason whatever to suppose that the highway was not in existence a very long time before the trees were planted. Accordingly, it is impossible to hold that those trees are not trees planted in the highway. The same sort of suggestion was made as regards the trees in St. Andrew's Road with, as it seems to me, very much less plausibility, and I cannot conceive that I could hold that St. Andrew's Road consists partly of the carriageway and partly of the footway, between which there are pieces of ground occupied by the trees to which I have referred which do not form parts of the highway. Accordingly, I reach the conclusion that all the trees are trees which are planted in areas over which, as ancient highways, the public have rights of passage.

Now what results from that? In the first place, this results, in my view, that those trees interfere with the right which the public have, in the case of an ancient highway, of using the whole of the highway, whether it be what is called via trita, or, in modern language, if I may translate it, the made-up carriageway or not. The public are entitled to use the whole of the area of the highway, and, accordingly, those trees are an obstruction of the right of the public to use the whole of that area. If the highway authorities are satisfied that the obstruction is a serious one, in my view, they not only have the right, but indeed, as would seem to be suggested by some of the authorities, they are under the duty of removing the obstruction. In any case, such part of the obstruction as is a danger the highway authorities, in my view, have without doubt not merely the right but the duty to remove. Upon that ground, in my view, the defendants are entitled not only to remove those trees which I have mentioned, which, in my view, are a nuisance to the highway, but they are entitled to remove the other trees which for the moment are not so unsound as to be dangerous: they are entitled to remove them simply as obstructions.

There is another point with which I must now deal. Mr. Harman for the defendants has urged this point, that the

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plaintiff has no interest in the matter whatever. My views which I have been stating as regards the rights and duties of the highway authority are expressed upon the assumption that the plaintiff is the owner of the soil of that half of the highway which is adjacent to her property, and, accordingly, is the owner of the trees which grow in that half of the highway. But Mr. Harman, on behalf of the defendants, contends that, having regard to s. 149 of the Public Health Act, 1875, the plaintiff has no interest in these trees at all, that these trees are vested in the defendants themselves, that they are their trees for the purpose, at all events, of exercising whatever rights and duties they may have as the highway authority, and that the plaintiff has no title to interfere with them at all. That suggestion is based upon this: the parish of Clewer, in which the locus is situated, became in the year 1920 part of the borough of New Windsor, and from the moment at which it became part of that borough, s. 149 of the Public Health Act, 1875, applied to it. That section is headed "Regulation of Streets and Buildings," and it enacts as follows: "All streets, being or which at any time become highways repairable by the inhabitants at large within any urban district"—these streets are admittedly repairable by the inhabitants at large—"and the pavements stones and other materials thereof and all buildings implements and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority. The urban authority shall from time to time cause all such streets to be levelled paved metalled flagged channelled altered and repaired as occasion may require; they may from time to time cause the soil of any such street to be raised lowered or altered as they may think fit, and may place and keep in repair fences and posts for the safety of foot passengers. Any person who without the consent of the urban authority wilfully displaces or takes up or who injures the pavement stones materials fences or posts of or the trees in any such street shall be liable to a penalty not exceeding five pounds and to a further penalty not exceeding five shillings for every square foot of pavement stones or other materials so displaced

taken up or injured ; he shall also be liable in the case of any injury to trees to pay to the local authority such amount of compensation as the Court may award." The argument is that these trees, in the circumstances which I have stated and as I find them to be, are part of the " street," they are things provided for the purposes of the street, the trees are planted and stand as trees in a street, an amenity of the street, possibly, as marking off the footway from the carriage-way, a convenience and a protection to the public ; and the argument is that under that section they vest in and are under the control of the urban authority. It is pointed out that, if the trees are injured, compensation for the injury is to be paid to the local authority : that would suggest that the property in the trees would be in the local authority. It is pointed out further that a penalty is put upon persons who without the consent of the local authority wilfully displace the trees ; that would seem to imply that displacing the trees with the consent or by arrangement with the urban authority would not be an offence, which again fits in with the suggestion that the effect of this section is to place the control and, in some sense or other, the property in the trees in the local authority. In my view that is the effect of the section as regards such trees as those with which I am here dealing. In my view, for all the purposes of exercising the rights of the highway authority, these trees are to be treated as the highway authority's trees, and if they think it convenient to remove them it is proper that they should remove them. I am not called upon in this action to decide to whom the timber would belong when the trees were removed.

In coming to this conclusion I have to face this, that in the case of *Coverdale* v. *Charlton* (1) Bramwell L.J., in a judgment which has often been referred to, expressed some doubt whether the effect of this section was to vest the property in the trees in the highway authority. It was not necessary for the purposes of that case to decide this point, but that case did determine this, as I read it, that there was

(1) 4 Q. B. D. 104, 117.

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a right of property, of some kind at all events, vested in the highway authority, in the herbage growing in the soil of the highway; and I have some difficulty in seeing why there should not be a similar right of property, however far it extends, in the other vegetable growth in the soil of the highway which is constituted by the trees in the case with which I have to deal.

Being of that opinion in regard to the application of that section, it was, in the circumstances, unnecessary for me to deal with the other questions with which I have already dealt, because if the view that I take of this section is correct the plaintiff is a stranger to the matter in hand. This is not an action which is brought on the footing that the defendants are doing or threatening to do something which would be an improper exercise of their powers as a highway authority, or are exercising or threatening to exercise their powers unreasonably. On the view I take with regard to s. 149, I hold that the plaintiff is a stranger to the whole matter, and has no cause of action. The action will be dismissed.

Solicitors: *Mills & Morley; Sharpe, Pritchard & Co.*

H. C. H.

In re EVENO'S PATENT.

LUXMOORE J.

1932

April 28, 29; *May* 4.

[1932. E. 015.]

Patent—Specification—Petition for Revocation—Anticipation—Amendment of Specification by Comptroller—Disclaimer—Powers of Comptroller—Amendment making substantially novel Claim not permissible—Patents and Designs Acts, 1907 *and* 1919 (7 *Edw.* 7, *c.* 29; 9 *&* 10 *Geo.* 5, *c.* 80), *ss.* 7, 8, 11, 21, 22, 26.

In proceedings for the revocation of a patent under s. 26 of the Patents and Designs Acts, 1907 and 1919, the power of the Comptroller to require the specification to be amended by disclaimer, correction, or explanation does not enable him to accept an amendment put forward by the patentee covering a wider claim or a different claim from that made in the unamended specification. Sect. 26 does not widen or enlarge the powers of amendment conferred on the Comptroller under s. 21 or on the Court under s. 22.

The procedure of amendment by way of disclaimer cannot be used so as to extract from the specification some feature or features not claimed or suggested as constituting the original invention, and to claim them as being the invention.

In re Bamber, Cropper & Co., Ld.'s, Application (1924) 41 R. P. C. 417 followed and applied.

PETITION.

The facts as stated by the learned judge in his judgment were as follows:—

The petition was presented by a German national for revocation of Letters Patent No. 308,932, the respondents to the petition being a French national, Georges Eveno, and a French company, Société Internationale Isothermos; this company is now the registered owner of the patent, M. Eveno, the original grantee, having assigned it to the company. I will refer to the respondents as the patentee, and the petitioner as the opponent, because that is the nomenclature which has been used throughout the proceedings before the Assistant Comptroller and before me.

The petition is presented under s. 26 of the Consolidated Patents and Designs Acts, 1907 and 1919 (1), by way of an

(1) Patents and Designs Acts, 1907 and 1919:—

Sect. 21: "(1.) An applicant or a patentee may at any time, by request in writing left at the Patent Office, seek leave to amend his specification, including drawings forming part thereof, by way of

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appeal from a decision of the Assistant Comptroller. His decision was given on February 5, 1932, on an application dated August 25, 1930, for revocation of the patent. The grounds of application were set out in the appropriate manner, and they were three in number: First, that the invention covered by the patent in suit was the opponent's invention and had been taken from him; secondly, that the invention described and claimed by the patent was the invention described and claimed in Letters Patent No. 311,419 granted to the opponent; and, thirdly, that neither the nature of the alleged invention nor the manner of its performance was sufficiently or fairly described and ascertained in the specification.

The first of these objections was withdrawn by notice in writing dated October 5, 1931. It was admitted before the Assistant Comptroller and before me that the patent as

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disclaimer, correction, or explanation, stating the nature of, and the reasons for, the proposed amendment. . . . .

"(6.) No amendment shall be allowed that would make the specification, as amended, claim an invention substantially larger than or substantially different from the invention claimed by the specification as it stood before amendment."

Sect. 26: " 1. Any person who would have been entitled to oppose the grant of a patent, or is the successor in interest of a person who was so entitled, may, within two years from the date of the patent, apply to the comptroller for an order revoking the patent on any one or more of the grounds on which the grant of the patent might have been opposed.

" Provided that, when an action for infringement or proceedings for the revocation of the patent are pending in any court, an application under this section shall not be made except with the leave of the court.

"(2.) The comptroller shall give notice of the application to the patentee, and after hearing the parties, if desirous of being heard, may make an order revoking the patent or requiring the specification relating thereto to be amended by disclaimer, correction, or explanation, or dismissing the application; but the comptroller shall not make an order revoking the patent unless the circumstances are such as would have justified him in refusing to grant the patent had the proceedings been proceedings in an opposition to the grant of the patent.

"(3.) A patentee may at any time by giving notice in the prescribed manner to the comptroller, offer to surrender his patent, and the comptroller may, if after giving notice of the offer and hearing all parties who desire to be heard he thinks fit, accept the offer, and thereupon make an order for the revocation of the patent.

"(4.) Any decision of the comptroller under this section shall be subject to appeal to the court."

granted was in fact covered by the patent No. 311,419, and could not, therefore, remain in its original form. The Assistant Comptoller decided that this objection could be cured by amendment to the patent, and in the result ordered that certain specific amendments set out in his decision should be made. The opponent appeals from this order, and says that there is no jurisdiction under the Act to make the amendments ordered, and petitions for revocation of the patent; the main ground relied on by the opponent being that the amendments ordered do not fall under any one of the three permissible heads of amendment—namely, disclaimer, correction or explanation. It is agreed that the amendments do not fall under either of the two last mentioned heads, that is, correction or explanation.

Counsel for the opponent argue that the only amendments allowable under the heading of disclaimer are such as do not substantially enlarge the original claim, or do not enable a substantially different invention to be claimed, while counsel for the patentee say that the Comptroller's power of amendment under s. 26 of the consolidated Acts is practically unfettered, and consequently, even if the amendments directed result in an enlargement of the original specification or in the protection of an invention substantially different from that originally claimed, the Comptroller has ample jurisdiction to order those amendments. Counsel for the patentee further argued that the amendments ordered do not, on the true construction of the patent as originally granted, cause any substantial enlargement of that patent or result in the protection of an invention not disclosed by the original specification.

The first point, therefore, to determine is what as a matter of construction is the invention described in and claimed by the patent as originally granted, without reference to the amendments ordered by the Assistant Comptoller?

Now the patent is described as being one for "Improvements relating to bushes for axle boxes"—I am reading from the specification at line 9 on page 1—"of the type for lubricating from above, for railway vehicles, of the character in which

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the bush fits over the end of an axle of somewhat smaller diameter than that of the bush, thus forming at the lower portion, between the end of the axle and the bush a space which is sufficiently large to enable the oil to fall directly on to the end of the axle." So far this is a mere description of the type of bush to which the invention to be described and claimed is to apply. The specification continues: "According to the present invention, which is applied to axle boxes of the character referred to, oil conducting passages, which extend through the bush, lead to longitudinal grooves arranged at suitable levels on the inner surface of the bush and distributing oil along the whole length of the bush by a dripping edge. Oil collecting cavities and pockets may be provided in the inner surface of the bush at the points of the longitudinal grooves to which lead the oil conducting passages extending through the bush." Obviously on this description the feature of the invention is the presence of oil conducting passages cut on the outside of the bush and provided with holes which extend through the bush and lead to the longitudinal grooves on the inner surface of the bush, these grooves being provided with what is described as a dripping edge. After a reference to the drawings attached to the specification, to which I need not refer beyond saying that they explain quite clearly what is meant by the description "the oil conducting passages," the specification continues at line 64: "According to the present invention these passages"—that is, the passages cut in the outside of the bush—"lead to oil conveying passages 9, 10 and 11"—that is, the holes bored into and extending through the bush—"which lead to collecting and distributing passages provided approximately over the whole length of the internal surface of the bush."

The specification then describes how the oil conveying passages extending through the bush lead to the longitudinal grooves on the inner surface of the bush and so reach the dripping edge. One of the oil conveying passages extending through the bush is distinguished by the number 9. This passage is shown in Fig. 1 as being at the top and in the centre of the bush. The oil from this passage is conducted

to the longitudinal internal grooves by branches which have been referred to as spider grooves ; but there is no suggestion that I can find in the specification that this is in any way a characteristic of the invention described. Indeed, the specification, in a passage beginning at line 92 on p. 1, expressly states that the position and number of these spider grooves and of the passages may be modified so as to cause them to communicate with the longitudinal internal grooves at points other than those indicated, and that their number may be increased.

The claims as originally allowed make this quite clear. Claim 1 is for " Bushes for axle boxes of the character referred to "—that is of the type for lubricating from above for railway vehicles where the bush fits over the end of an axle smaller in diameter than the bush—" characterised "—and this is emphasized as the feature of the invention—" in that these passages "—and it is obvious these are the passages in the outer periphery of the bush with the holes or passages which extend through the bush—" lead to longitudinal grooves arranged at suitable levels on the inner surface of the bush and distributing oil from along the whole length of the bush by a dripping edge." Claim 2 is for : " Bushes for axle boxes according to claim 1, characterised "—and again this is emphasized as a feature of the invention—" in that oil collecting cavities and pockets are provided in the inner surface of the bush at the points of the longitudinal grooves to which lead the oil conducting passages extending through the bush." Claim 3 is for : " Bushes for axle boxes of the character referred to, constructed, arranged and adapted for use as a whole, substantially as described, in connection with the various figures of the accompanying drawings." Reading the specification and examining the drawings, although it is plain that there is an oil conveying passage in the top centre of the bush, extending through the bush and leading to the spider grooves for conducting the oil through the central passage to the longitudinal distributing grooves, I cannot find any suggestion that this central passage and the spider grooves are the characteristic features, or characteristic

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features of the invention claimed. The thing which is stressed as the feature of the invention appears to me to be the provision of the external passages, and the passages extending through the bush, and of the longitudinal grooves on the inner surface of the bush in conjunction with the dripping edge.

These features are admitted to be the features claimed by the Letters Patent No. 311,419, granted to and relied upon by the opponent. Consequently, Letters Patent No. 308,932 in the original form could not be allowed to stand. The Assistant Comptroller has directed certain amendments. I need not read the actual amendments themselves. They are quite unambiguous, and their effect is to acknowledge the existence of patent No. 311,419, and to disclaim anything claimed by it, and to claim as the patentees' invention the provision of the central oil conducting passage extending through the bush connected with the longitudinal grooves on the inner surfaces of the bush by the spider grooves, such spider grooves leading to opposite ends of the longitudinal grooves. As I have already stated, I cannot find any suggestion in the original and unamended Letters Patent of any claim to any such invention as is described in and would be protected by the Letters Patent as amended.

Trevor Watson K.C. and *K. E. Shelley* for the applicant. The Assistant Comptroller has accepted an amendment put forward by the patentee which recognizes the fact that the patent, as the specification originally stood, was hopelessly anticipated.

The questions now raised are (1.) whether the amendments accepted were properly allowed; (2.) whether the patent, even if so amended, can still stand; (3.) if the Comptroller was wrong and the amendments were not permissible, whether the patent can stand.

The Comptroller has over-estimated his jurisdiction under s. 26, and has assumed that he has a larger power of amendment under that section than under s. 21, under which he could not have made these amendments. Any permissible

amendment must come under one of three heads: (1.) disclaimer; (2.) correction; or (3.) explanation, but the present amendment does not come under any of them, though it purports to be by way of disclaimer. Even if the amendment is allowed the patent should be revoked either for want of novelty or for insufficient description, and this applies with even greater force if the amendment is disallowed. Under s. 21, sub-s. 6, no amendment is permissible that would make the specification as so amended claim an invention substantially larger than or different from the invention claimed before amendment. The Comptroller has held that this limitation does not apply to an amendment under s. 26, and it is submitted that his decision is wrong. The specification as amended is for a substantially different invention from that originally claimed: *In re British Thomson-Houston Co.'s Patent* (1), per Sargant J. The ground of disclaimer cannot be used to change an indefinite general claim into a definite and different claim: *In re Wistoft's Patent.* (2)

Hon. Sir Stafford Cripps K.C. and *L. F. Heald* for the patentee. The object and intention of s. 26 of the Patent Acts are to postpone for a limited time the ordinary rights of opponents in opposition proceedings. The institution of proceedings both under ss. 11 and 26 lies with opponents.

The proviso which appears in s. 21, sub-s. 6, does not appear in or apply to s. 26. The Comptroller may not make an order revoking the patent unless the circumstances are such as would have justified him in refusing to grant the patent in opposition proceedings, i.e., under s. 11. Under that section he could have made an amendment which, as here, would cure a defect in the specification. There are cases where an amendment may be made under s. 11 which could not be made under s. 26.

The difference between the two sections is in effect as follows: Under s. 11, in opposition proceedings, there is not the same need for care to avoid changing the centre of gravity of the invention, as there is under ss. 21 and 22. The safeguard is that it is the Comptroller who under s. 26 will require

(1) (1919) 36 R. P. C. 251, 257. (2) (1931) 48 R. P. C. 461, 466.

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the amendment by disclaimer, correction, or explanation. The amendment here made was a legitimate amendment under the head of disclaimer. By cutting out a portion of the original claim under the broad language of which it has been found that a prior claim is covered, there is a good claim left, as shown in the drawings with reference to which the invention is described.

The cases referred to on behalf of the applicant are distinguishable.

Trevor Watson K.C. in reply. The Comptroller is not bound to seek an amendment in order to save a patent from being avoided by anticipation: *In re Thomas & Prevost's Application* (1); *In re Mills' Application.* (2) The exercise of the power of amendment by the Comptroller cannot be used to frame a subject-matter not in view at the time of the original application. The patentee, if he finds his main claim has been anticipated, cannot point out something inside his claim which, he submits, has not been anticipated. The above authorities have recently been considered and applied in *In re Bamber, Cropper & Co., Ld.'s, Application.* (3) The proposed amendment substitutes a central oil passage with branch grooves for lubrication for the simple passages claimed by the original specification. It is not a disclaimer at all. To make an entirely new claim and to describe it as a disclaimer is a misuse of language.

Cur. adv. vult.

May 4. LUXMOORE J. [after stating the facts as set out above:] The Comptroller in ordering the amendments has purported to act under the provisions of s. 26 of the Consolidated Acts. [His Lordship read the section.] It is therefore necessary to consider and determine whether the Comptroller has power to make these amendments.

In terms there is no limit on the power of amendment so long as the amendments fall under one or other of the three heads. It is said that "disclaimer" is a word of wide

(1) (1898) 16 R. P. C. 69. (2) (1901) 18 R. P. C. 322, 324.
(3) 41 R. P. C. 417.

import and covers any form of amendment which in the result gives to the patentee a more restricted grant than that originally given by the unamended patent, because the restriction of the original grant results in the giving up of something originally claimed.

It is sought to support this argument by a reference to the other sections of the Consolidated Acts. The material sections on this argument are ss. 7, 8, 11, 21, 22, 25 and 26.

Under ss. 7 and 8, it is pointed out that the Comptroller has the widest powers of accepting amendments, and there is nothing to prevent the acceptance of an amendment which might enlarge or widen the ambit of the claims originally made, and reliance is placed on the fact that in neither of these sections is there any limitation of the power of amendment to amendments by way of disclaimer, correction, or explanation, although in the Rules prescribed under s. 8 reference to amendment by way of disclaimer, correction, or explanation is to be found.

Then s. 11 deals with oppositions to grants. It does not provide specifically for amendments, but it is the practice in the Office in the course of such proceedings to consider and even to suggest amendments, and finally to make the grant in an amended form. Before 1905 it was the duty of an applicant for a patent to make his own searches and investigations, but since that date these investigations are made in the Patent Office. The practice as it existed before 1905, and the alteration which has resulted from the change then made, has, I think, been clearly and accurately summarized by the Assistant Comptroller in his decision on April 25 of this year in the matter of an application by *Holzverkohlungs Industrie Aktiengesellschaft* for Letters Patent No. 315,818, and in the matter of an opposition by *British Celanese, Ld.* (1) In the course of his decision he referred to the practice as laid down in certain judgments, which he refers to on p. 3 of the decision: *Whittaker's Application* (2); *Lupton & Place's Application* (3); *Thomas & Prevost's Application* (4); and

(1) Not yet reported.
(2) (1896) 13 R. P. C. 580.
(3) (1897) 14 R. P. C. 261.
(4) 16 R. P. C. 69.

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Bamber & Cropper's Application. (1) He goes on to say : " It is to be observed that all of these cases with the exception of *Bamber & Others' Application* (1) were decided prior to the introduction of an official investigation into the novelty of inventions. Prior to the 1st of January, 1905, British patents were granted without any such inquiry. In the days when there was no official search, it was considered that it was part of an applicant's duty to find out for himself whether the invention which he proposed to claim was novel, and if it turned out as the result of researches made by an opponent that the statement of claim formulated by the applicant was untenable, it was not the practice to allow extensive redrafting of the applicant's claims in order to save from the wreck something which had not previously been clearly presented as being a distinctive part of the matter sought to be protected. In *Lupton & Place's* case Sir Robert Finlay said : ' If all that the applicants wanted was a patent for such an improvement as making the groove V-shaped instead of square, they ought to have said so in the first instance ' ; and in *Thomas & Prevost's* case the same law officer said : ' It is the duty of the applicant to frame his specification in such a way that a patent may be properly granted ; and while I do not wish to say anything that might appear to have a tendency to limit the discretion as to limits being imposed as a condition of granting a patent, I desire it to be distinctly understood that it is not at all a matter of course that if the specification is presented in such a form that the patent cannot be granted without amendment, the necessary amendment will be made.' But even at that time, amendment of the kind that might be described as disclaimer without complications was freely allowed at the opposition stage. After the introduction of an official investigation into novelty it was no longer possible to hold that it was part of the applicant's duty to make such an investigation for himself, and once the rather sanguine expectation that an inventor would find time for bibliographical research as well as for originative work had been abandoned, it was natural that a rather more liberal view as to the possibilities

(1) 41 R. P. C. 417.

of amendment of an applicant's specification at the opposition stage should prevail. The basis of the whole patent system is the idea of encouraging invention, and provided that an opponent obtains the relief to which, upon the proved facts, he is entitled, there is no obvious reason why the residue of novel matter which has in fact been contributed to the art by the applicant, should not be protected. If the applicant has made no substantial contribution to the art at all, of course a patent ought not to be granted to him; but if the manner of manufacture set forth by the applicant in his specification is in part novel, the fact that the specification and claims require considerable redrafting so as to confine the invention to the novel matter has not, of recent years, been held to be a fatal bar to the granting of a patent to the applicant."

In the result the present practice in opposition proceedings is to allow amendments which give the inventor the benefit of any part of his invention which is novel, but this would not justify the allowance of amendments to protect as an invention something not suggested as the subject-matter of the original claim, except on the footing that the date of the acceptance of the amendments should be substituted for the date of the original application.

Sect. 21 confers a power upon the Comptroller to amend a specification at any time before the grant or during the life of the patent at the request of the applicant or the patentee, but in such case the amendment must be by way of disclaimer, correction, or explanation. By sub-s. 6 there is a further express limitation, because that sub-section provides: "No amendment shall be allowed that would make the specification, as amended, claim an invention substantially larger than or substantially different from the invention claimed by the specification as it stood before amendment." Sub-s. 8 provides: "This section shall not apply when and so long as any action for infringement or proceeding before the court for the revocation of a patent is pending."

Sect. 22 provides: "In any action for infringement of a patent or proceedings before a court for the revocation of a patent the court may by order allow the patentee to amend

LUXMOORE J. 1932 EVENO'S PATENT, *In re.*

his specification by way of disclaimer, correction or explanation in such manner, and subject to such terms as to costs, advertisement or otherwise, as the court may think fit." Again, there is a proviso: "that no amendment shall be so allowed that would make the specification, as amended, claim an invention substantially larger than, or substantially different from, the invention claimed by the specification as it stood before the amendment."

Sect. 25 confers the right to petition the Court for revocation, but this section does not deal with amendment.

Sect. 26, the section applicable here, confers a limited right to apply for revocation. I need not read it again. It is to be observed that it only applies to a limited class of persons. The right is given for a limited time, and the grounds on which the application can be founded are also limited. The Comptroller is empowered by sub-s. 2 to deal with applications in three different ways. He may revoke or he may order the amendment or dismiss. The order for amendment is, again, limited to amendments falling under one or other of the three heads, but there is no express proviso like that found in sub-s. 6 of s. 21, or in s. 22, declaring that the amendment shall not substantially enlarge the claim and enable a substantially different invention to be claimed. On this it is argued, and the Assistant Comptroller has held, that the power to order amendment in a case under s. 26 is wider than under the other sections, and is as wide as the power of amendment in the opposition stages.

I think the real point for determination in the present case is what is meant by the phrase "amendment by way of disclaimer"? Can it be said that any amendment which in fact results in a narrower claim than that originally put forward is by way of disclaimer? In my judgment, it is necessary to consider not whether the amended claim is narrower or more restricted than the original claim, but whether it covers something not claimed or suggested as constituting the original invention or part of the original invention. If it does, then it seems to me that the amendment can only properly be described as covering a fresh claim, and

it would be an abuse of language to say that such a claim arose owing to amendment by way of disclaimer.

In my judgment, for the reasons I have stated, I do not think that s. 26 widens or enlarges the powers of amendment conferred on the Comptroller or the Court by ss. 21 and 22 respectively. It would indeed be a strange result if the Comptroller should be invested with wider powers of amendment in the event of an application to revoke a patent on the limited grounds allowed by s. 26 than the powers of amendment conferred upon him and on the Court respectively when the application is expressly directed to amendment at the instance of the patentee, and not to revocation at the instance of some third party.

In my judgment, the amendments ordered by the Comptroller in effect change the whole character of the original specification, and would in the result confer on the patentee a monopoly for an invention which is not suggested as the subject-matter, or one of the subject-matters of the original claim. In these circumstances I think the Comptroller was not justified in ordering the amendments enumerated in his decision, and I think he ought to have revoked the patent.

The conclusion that I have come to is that the appeal should be allowed and the patent should be revoked.

I therefore order the revocation of the patent, but, as the case may go higher, I will direct the order to lie in the Office for twenty-one days, and if within the twenty-one days Mr. Heald's client appeals and prosecutes his appeal with due diligence, then the order will continue to lie in the Office until it is dealt with by the Court of Appeal.

Solicitors: *Derick R. Martin; Allen & Overy.*

H. L. L.

EVE J.

1932

March 16.

In re HORNE'S SETTLEMENT.

COUTTS AND COMPANY *v.* DUCHESSA DUSMET DE SMOURS.

[1932. H. 534.]

Settlement—Divorce—Covenant by Husband—Annuity to former Wife in lieu of Alimony—Restraint upon Anticipation during Coverture—Remarriage of Wife—Bankruptcy of Covenantor—Proof of Debt by Trustees—Arrears of Annuity—Dividend less in Amount than Arrears Due—Whether payable to Annuitant notwithstanding Restraint.

A marriage having been dissolved by a decree absolute in 1925, the wife remarried shortly afterwards. Immediately before the remarriage the former husband executed a settlement on his former wife in consideration of her release of any claim to alimony or maintenance from him. By the settlement the husband covenanted with his former wife and as a separate covenant with the trustees to pay her, during their joint lives, an annuity of such an amount as after deduction of income tax would yield the clear sum of 3000*l.* a year for her separate use without power of anticipation whilst under coverture.

In 1929 the former husband was adjudicated bankrupt. The plaintiffs, as trustees of the settlement, and the defendant, the former wife, jointly proved in the bankruptcy for a large sum made up of several items, of which 41,723*l.* represented the capital value of the annuity of 3000*l.* The proof was admitted, and in December, 1931, a dividend of 6*d.* in the pound was paid to the plaintiffs. This amounted to 2322*l.*, of which 1043*l.* 1*s.* 6*d.* was the proportion attributable to the annuity. On a summons taken out by the plaintiffs to determine the question whether they ought to pay to the defendant the dividend so far as it was attributable to the annuity, notwithstanding the restraint upon anticipation, or whether they ought to invest the same, as being capital, in purchasing an annuity for the life of the defendant :—

Held, that the trustees could properly pay the whole dividend to the defendant.

In re Bown (1884) 27 Ch. D. 411 applied.

ADJOURNED SUMMONS.

The defendant, Margaret Rosemary, wife of the Duca Dusmet de Smours, was formerly the wife of Henry Spence Horne, but her first marriage was dissolved by decree absolute made on June 15, 1925. On July 6, 1925, the defendant was married to the Duca Dusmet de Smours, and since then had been resident in Italy. There was no issue of either marriage.

By a settlement dated July 1, 1925, and made between Henry Spence Horne of the first part, the defendant (then Margaret Rosemary Horne) of the second part, and the plaintiffs of the third part, in consideration of the release by the defendant of any claim on her part to alimony or maintenance and of acceptance by her of the provisions therein contained, H. S. Horne covenanted with the plaintiffs, and also as a separate covenant with the defendant, that he would during the joint lives of himself and the defendant pay to her an annuity of such an amount as should, together with the income from certain trust premises after deduction of the income tax therefrom, yield or make up the clear sum of 3000*l.* a year, to accrue from day to day, and it was further provided that the annuity should whilst the defendant should be under any coverture be for her separate use without power of anticipation.

On November 27, 1929, a receiving order in bankruptcy was made against H. S. Horne in the High Court, and on December 9 he was adjudicated bankrupt, K. A. L. Bennett being appointed trustee of his estate.

On January 1, 1931, a joint proof of debt was sworn in the bankruptcy on behalf of the plaintiffs and the defendant for an amount of 92,903*l.*, made up of several items, of which 41,723*l.* represented the estimated capital value of the annuity of 3000*l.* free of income tax for the joint lives of the bankrupt and the defendant and computed from the date of the receiving order.

The proof was admitted by the trustee, and on December 14, 1931, a dividend of 6*d.* in the pound in respect thereof was received by the plaintiffs as trustees of the settlement. This amounted to 2322*l.* 11*s.* 7*d.*, of which 1043*l.* 1*s.* 6*d.* was the proportion properly attributable to the 41,723*l.*

The summons asked whether the plaintiffs, as trustees of the settlement, ought to pay to the defendant, notwithstanding the restraint upon anticipation imposed by the settlement, the sum of 1043*l.* 1*s.* 6*d.*, or any and what part thereof and any further dividends they might receive or any

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and what part thereof under the proof in the bankruptcy, or whether they ought to lay out the 1043*l.* 1*s.* 6*d.* or any and what part thereof and any such further dividends in purchasing an annuity for the life of the defendant, to be paid to her whilst she should be under coverture for her separate use without anticipation.

Herbert Jacobs for the plaintiffs. The question is whether the plaintiffs are bound to invest this dividend in purchasing another reduced annuity, subject to a restraint upon anticipation. It is submitted that an annuitant, although restrained from anticipation, who is bound to accept payment of the whole annuity in the shape of a dividend for damages for breach of covenant in the bankruptcy of the grantor, is entitled to retain the whole of the dividend, and it need not be invested in an annuity subject to the like restraint. The point is not exactly covered by any authority, but there are cases bearing upon it. The cases of annuities given under wills with a cesser clause and gift over if the annuity should be assigned or charged, such as *In re Dempster* (1) and *In re Ross* (2), are distinguishable. There is no gift over upon anticipation or alienation here, but a personal covenant to pay for which a discharge cannot be given by the annuitant if it is paid in advance. The defendant does not receive any money as part of the annuity; what she does get is a lump sum representing a dividend in the bankruptcy of the covenantor, who is liable for breach of covenant in damages. Such a sum cannot be subject to a restraint upon anticipation. The only way in which the defendant can recover any of this annuity is to prove in bankruptcy for it. She is bound to accept the dividend paid and can give a good discharge for the debt: see *In re Sinclair.* (3)

G. D. Johnston for the defendant. Under the Bankruptcy Act, 1914, all forms of liability must be valued, so the defendant had to prove for the annuity. In the circumstances no restraint upon anticipation attaches, as there is no

(1) [1915] 1 Ch. 795. (2) [1900] 1 Ch. 162.
(3) [1897] 1 Ch. 921.

income to which it can attach. What she receives is compensation or damages for breach of covenant in a lump sum, and no restraint on anticipation can apply to a lump sum: *In re Bown.* (1)

EVE J. The annuity in this case was not the subject of a bequest, but was payable under a covenant, and the annuitant as the creditor of the bankrupt covenantor is the only person entitled beneficially to the dividend. Were she to die before receiving it, it would be part of her estate. The restraint on anticipation or alienation might attach to any excess of the dividend over the arrears for the time being due to the annuitant, but, inasmuch as there are already arrears to an amount greatly in excess of the moneys in the hands of the plaintiffs, there is in my opinion no ground for retaining any part of the 1043*l.* 1*s.* 6*d.*, and the trustees can properly pay the same to the defendant. I think this result is in accord with the judgment of the Court of Appeal in *In re Bown.* (1)

Solicitors: *Parker, Garrett & Co.; Michael Abrahams, Sons & Co.*

(1) 27 Ch. D. 411.

H. L. L.

EVE J. 1932 *June* 27, 29; *July* 12.

In re NATIONAL BENEFIT ASSURANCE COMPANY, LIMITED.

[No. 00375 of 1922.]

Estoppel—Insurance Company—Issue of Marine Reinsurance Policy—Indorsement on Policy—Due Fulfilment of Obligations of Policy guaranteed by another Company—No Evidence of formal Contract of Guarantee—Estoppel by Representation.

A series of marine reinsurance policies were issued by the National Marine Insurance Company to the applicants, upon each of which a claim for loss or damages arose. At the top of each policy was printed in red ink the following indorsement: "The due fulfilment of the liabilities arising under this policy is guaranteed by the National Benefit Assurance Company, Ld., established in 1890 and with assets exceeding 1,500,000*l.*"

The two companies, which were in liquidation, were closely associated, and shared the same chairman, managing director and underwriter, and the same offices and clerical staff. There was no evidence of any formal contract of guarantee of the policies between the two companies, and on this ground the liquidator of the National Benefit Company rejected the applicants' proof:—

Held, that the company, on the evidence, was estopped from denying that the policies issued by the National Marine Company bearing the above indorsement, were so guaranteed, and the applicants were therefore entitled to prove in the winding-up of the company.

SUMMONS in winding-up.

The facts were stated by the learned judge in his judgment as follows:—

This is an application on the part of the London General Insurance Company, Ld. (which I shall hereinafter refer to as "the London company"), to review the rejection by the liquidator of the National Benefit Assurance Company, Ld. (hereinafter referred to as "the National Benefit"), of the applicants' proof for 1019*l.* 7*s.* 11*d.* The decision in this case will determine the position of six other proofs for various amounts. The material facts are as follows: Between April 26, 1921, and June 25, 1922, a company called the National Marine and Fire Insurance Company, Ld. (hereinafter referred to as "the National Marine"), issued to the London company seven marine reinsurance policies, including the one with which this summons is concerned, upon each of which a claim for loss or damages arose.

Proofs for these claims have been admitted in the winding-up of the National Marine, and a small dividend paid thereon. The London company claim that they can prove against the National Benefit for the deficiency by reason of an indorsement on each of the said policies to the effect that "the due fulfilment of the liabilities arising under this policy is guaranteed by the National Benefit Assurance Company, Ld., established in 1890 and with assets exceeding 1,500,000*l.*"

In the absence of all evidence of any guarantee of any policies of the National Marine having been given by the National Benefit and of any reference thereto, either in the books or records of the National Benefit or the National Marine, the liquidator of the National Benefit has rejected the claim of the London company, and the question I have to decide is whether he was justified in so doing.

The relationship between the National Benefit and the National Marine was at all material times very intimate. The latter was promoted by the former in 1908, and in July, 1922, orders were made for the compulsory liquidation of both. The National Benefit held a large majority of the shares of the National Marine. Both companies had the same chairman, Mr. R. W. Granville Smith, the same managing director, Mr. Joseph Francis, and the same underwriter, Mr. Maurice Diaz; the last named was also a director of both companies, as also was a Mr. Frederic G. Schonberg. According to the Official Receiver's reports of March and April, 1923, which were put in evidence, "the general affairs of the insurance business of the National Benefit appear to have been controlled by the managing director, the remaining members of the Board being content to rely on his recommendation and judgment. The marine department was conducted entirely by the underwriter," and "The marine risks of the National Marine were written by Maurice Diaz, the underwriter employed by the National Benefit, which received from the National Marine a commission for his services, clerical staff and use of offices." This commission was divided amongst the National Benefit, the underwriter, and the managing director.

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It was in these conditions that Diaz approached the London company, for which he was also the marine underwriter, and asked the managing director of that company to be allowed to place some of the reinsurance of the London company with the National Marine, informing him at the same time that the National Marine had been formed by the National Benefit, and that the latter would guarantee the fulfilment of all liabilities arising under policies issued by the National Marine. On the faith of this guarantee Diaz was authorized to place certain of the London company's reinsurances with the National Marine, and the seven policies were subsequently issued with the indorsement to which I have already referred printed in bold red type at the top of the front page of each policy.

Two affidavits have been filed in support of this summons, one by Mr. Ernest Cheetham, the managing director of the London company, proving the circumstances I have already summarized, in which he acceded to the suggestion to give some of his company's reinsurance business to the National Marine on having the obligations of the last-named company guaranteed by the National Benefit, and the intimate connection between the National Marine and the National Benefit; and the other by Mr. Maurice Diaz, wherein he states that he agreed with Mr. Francis to underwrite marine insurance business for the National Marine on two conditions, the one that the capital of the National Marine should be increased and the other that the National Benefit should guarantee the obligations undertaken by the National Marine; that the capital was in fact increased and that Francis undertook to arrange for the fulfilment of the other condition; that thereafter he, the deponent, underwrote marine business on behalf of the National Marine on the terms that the liabilities under these policies were guaranteed by the National Benefit, and that the red ink indorsement at the head of all the marine policies issued by the National Marine to the London company correctly expressed the arrangement come to with Francis.

He adds: "I do not know whether there was any formal agreement between the National Benefit and the National

Marine recording this guarantee, but it was well known to the directors of the National Benefit that the marine policies of the National Marine were being issued with a note of this guarantee endorsed thereon"; and in a later paragraph: "The fact that the National Benefit was guaranteeing the liabilities of the National Marine under its marine policies was well known to the directors of both companies and prior to my receiving a request from Mr. Cheetham to confirm this fact, I had never heard it questioned by the directors of either of these two companies or by any one else."

G. O. Slade for the applicants. The basis of the claim is on privity of contract between guarantor and guaranteed, and it may be proved in any one of four ways: (1.) express agreement; (2.) implied agreement to be inferred from conduct; (3.) ratification; (4.) estoppel. On the evidence there could be no stronger case of estoppel than the present: *Pickard* v. *Sears*. (1) Joseph Francis was the managing director of both companies, and Maurice Diaz was a director and the marine underwriter of both companies. The evidence of Diaz is that all reinsurances effected by the Marine company were on the basis of a guarantee of the obligations of the policy by the Benefit company. He acted as the common agent of both companies: *Young* v. *Schuler* (2); *Welford* v. *Beazely*. (3) The authority given to an agent to sign need not itself be in writing: *Durrell* v. *Evans*. (4) Parol evidence is admissible to prove the capacity of a signatory. A person who only signs an agreement as a witness may be bound by his signature as a party: *Welford* v. *Beazely*. (3)

The cases on estoppel, especially *Freeman* v. *Cooke* (5), are discussed in the recent decision of the Court of Appeal in *Greenwood* v. *Martins Bank*. (6)

C. J. Radcliffe for the respondent. The evidence does not amount to the making of any contract of reinsurance by the National Benefit Company. The London General

(1) (1837) 6 Ad. & El. 469.
(2) (1883) 11 Q. B. D. 651.
(3) (1747) 3 Atk. 503; 1 Ves. Sr. 6.
(4) (1862) 1 H. & C. 174.
(5) (1848) 2 Ex. 654.
(6) [1932] 1 K. B. 371. Since affirmed in H. of L. [1932] W. N. 178.

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company authorized Diaz to place some of its reinsurance policies with the National Marine Company, and the managing director Francis undertook to arrange a guarantee, but he did not in fact do so. There is nothing more than an agreement to enter into a contract.

In cases of marine insurance informal arrangements are frequently made which are not intended to be legally binding.

There can be no estoppel to prevent a person alleging a promise, estoppel only applies to representations of fact.

Assuming there was a contract and the terms of the contract are in the indorsement in red ink, that memorandum was never signed by the managing director: all that he signed was the policy itself. The Statute of Frauds has not been complied with: *Caton* v. *Caton* (1), per Lord Westbury.

The signature must be so placed as to authenticate every part of the instrument signed: see Fry on Specific Performance, 6th ed., at pp. 252, 253.

G. O. Slade in reply. For the purposes of the question of estoppel I assume there was no express contract between the parties. The directors all knew quite well what was being done, and they allowed their names to be affixed to a document which induced the London General Company to place marine insurance business with the National Marine Company.

The decision in *Caton* v. *Caton* (1) is distinguishable from *Young* v. *Schuler* (2) on the facts.

Cur. adv. vult.

EVE J. [after stating the facts as above:] Upon the evidence I cannot hold that the applicants have established any agreement on the part of the National Benefit to guarantee the marine liabilities of the National Marine, or that Francis was ever authorized to sign such an agreement on behalf of the National Benefit. But they have, in my opinion, proved sufficient to estop the National Benefit from successfully asserting that the liabilities were not in fact guaranteed by

(1) (1867) L. R. 2 H. L. 127, 142. (2) 11 Q. B. D. 651.

the National Benefit. According to the evidence not contradicted, and not cross-examined to, it was well known to all the directors of the National Benefit that their company was guaranteeing the marine risks of the National Marine. On the policies indorsed with the memorandum stating the guarantee appeared the names of the managing director, the underwriter and the secretary of both the National Benefit and the National Marine, and the policies so indorsed were signed by the managing director. Every essential factor giving rise to an estoppel as stated by Lord Tomlin in *Greenwood* v. *Martins Bank* (1) is present : (1.) a representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation was made, that is the London company ; (2.) an act by the person to whom the representation was made resulting from such representation or conduct, that is the reinsurance with the National Marine ; and (3.) detriment to such as a consequence of the act.

In my opinion the National Benefit cannot escape from the consequences of the representation which they knowingly made in allowing the policies of the National Marine to be issued with the indorsement, and the applicants are consequently entitled to prove against the National Benefit for the balance of the debt not paid out of the assets of the National Marine. The costs of the summons must be paid by the respondent out of the assets of the National Benefit.

Solicitors : *Stafford Clark & Co. ; Parker, Garrett & Co.*

(1) 47 Times L. R. 607 ; [1932] W. N. 178.

H. L. L.

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July 12, 13.

SYKES *v.* WILLIAMS.

[1932. S. 2625.]

[MANCHESTER DISTRICT REGISTRY.]

Limitations, Statutes of—Grant of Freehold Land—Perpetual Yearly Rentcharge—Power of Re-entry on Rentcharge becoming One Year in arrear—No Rent paid for Twenty Years—Rentcharge barred—Power of Re-entry exercisable—Right accruing afresh on each Default in Payment—Relief from Forfeiture on terms—Real Property Limitation Act, 1833 (3 *& 4 Will.* 4, *c.* 27), *s.* 3—*Real Property Limitation Act*, 1874 (37 *& 38 Vict. c.* 57), *s.* 1—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 1, *sub-s.* 2.

In 1912 freehold land was conveyed to purchasers in consideration of and subject to a perpetual yearly rentcharge of 25*l.* a year issuing out of the land and the buildings to be erected thereon, payable half-yearly in March and September. The grantees entered into a covenant for payment, and the conveyance also contained a power of re-entry exercisable by the vendor if and whenever the rentcharge should be in arrear and unpaid for one year, but limited to take effect during the lives of the parties thereto and the lives of the issue then living of Her late Majesty Queen Victoria and the survivors and survivor of them, and twenty-one years after the death of the survivor, and such other period (if any) as should be lawful.

No part of the yearly rentcharge of 25*l.* was ever paid, and in 1931 the vendor sued to recover possession with mesne profits. The defendant pleaded that the rentcharge and all remedies to recover the same were statute barred:—

Held, that though the personal remedy on the covenant for payment was barred, the power of re-entry was not extinguished or barred by s. 1 of the Real Property Limitation Act, 1874, and s. 3 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), (1) inasmuch as it accrued afresh in respect of each subsequent half-yearly day whenever any part of the rentcharge was in arrear for one year, and the plaintiff was therefore entitled to rely on the default in payment which occurred in the years 1919 to 1923 inclusive. The right of re-entry was not merely an incident annexed to the rentcharge.

The Court, however, granted relief from forfeiture under its general equitable jurisdiction upon terms.

Barratt v. *Richardson & Cresswell* [1930] 1 K. B. 686 followed and applied.

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(1) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27). Sect. 3: "In the construction of this Act the right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been

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By a conveyance dated June 7, 1912, and made between Herbert Rushton Sykes, the plaintiff, of the one part, and Edward Williams, the defendant, and Hugh Williams of the other part, a plot of land in Edgeley, Stockport, upon part of which four dwelling-houses had since been erected, and containing 3278 square yards or thereabouts, was granted and conveyed by the plaintiff to the defendant and Hugh Williams (therein described as "the grantees") and their heirs, to the use that the plaintiff, his heirs and assigns should receive a perpetual yearly rentcharge of 25*l.* issuing out of the land thereby conveyed and the buildings erected or to be erected thereon, and payable by two equal half-yearly payments on March 25 and September 29 in every year. And subject to the rentcharge and to the statutory powers and remedies for recovering and compelling payment thereof to the use of the grantees, their heirs and assigns as tenants in common in equal shares.

By the conveyance the grantees and each of them covenanted with the plaintiff at all times thereafter to pay the said rentcharge of 25*l.* at the times and in manner aforesaid. And it was also provided that if and whenever the yearly rentcharge or any part thereof should be in arrear and unpaid for one year after either of the half-yearly days thereinbefore appointed for payment (whether demanded or

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in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such disposition or discontinuance of possession, or at the last time at which any such profits or rent were or was so received. . . . ."

Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57). Sect. 1: "After the commencement of this Act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

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not) or if there should be any breach of the covenants therein contained on the part of the grantees then, notwithstanding the waiver of any previous default or breach, it should be lawful for the grantees and they thereby granted unto the plaintiff, his heirs, executors, administrators and assigns, owner or owners for the time being of the said rentcharge at any time during the lives and life of the parties thereto and during the lives and life of the issue then living of Her late Majesty Queen Victoria and the survivors and survivor of them and twenty-one years after the death of such survivor and during such further period (if any) as should be lawful full and free liberty, power and authority to enter into and upon the said plot of land thereby conveyed and any buildings thereon or any part thereof in the name of the whole and to repossess and enjoy the same as if the conveyance had not been made.

Hugh Williams died on November 1, 1924, and letters of administration to his real and personal estate were granted on September 11, 1926, to the defendant and Thomas Williams.

Under the combined effect of the transitional provisions of the Law of Property Act, 1925, and of an appointment of new trustees dated May 10, 1927, and a conveyance dated May 11, 1927, and made between J. F. Andrew and J. T. Johnstone of the one part and the defendant of the other part, the defendant became entitled in fee simple to part of the said plot of land conveyed in 1912, and to four houses erected thereon, being 1A, 3A, 5A and 7A Vienna Road, Edgeley. The defendant was by his tenants in possession of the four dwelling-houses and their site.

No part of the yearly rentcharge had ever been paid. In particular the instalments due and payable on September 29, 1919, March 25 and September 29, 1920, and March 25 and September 29, 1921, 1922 and 1923, were all at the date of the issue of the writ in arrear for the space of one year after the dates fixed for payment.

The plaintiff, who was at all material times owner of the rentcharge, claimed possession of the four dwelling-houses,

together with mesne profits as from the date of the writ. The defendant admitted all the above facts as set forth in the statement of claim, and contended that the yearly rent-charge and all covenants and powers of re-entry incident thereto were at the date of the issue of the writ barred and extinguished by virtue of the Real Property Limitation Acts, 1833 and 1874. But if the rentcharge and/or the powers of re-entry were not so barred, he claimed relief from forfeiture under s. 146 of the Law of Property Act, 1925.

Henry Johnston and *Denis Johnston* for the plaintiff. There is no dispute of fact; the defendant admits all the allegations in the statement of claim. The right to recover the rent-charge is no doubt barred by the Real Property Limitation Act, 1874, no payment having been made since the grant in 1912. But the power of re-entry accrues afresh as each payment of rent becomes in arrear for one year, and is still exercisable. The plaintiff is, therefore, entitled to recover possession: *Barratt* v. *Richardson & Cresswell.* (1)

J. M. Easton for the defendant. The rentcharge became extinguished in 1925. The power of re-entry is merely incident to the rentcharge, and if the rentcharge is dead, all remedies for its recovery, whatever their nature, are equally extinguished. The grant of the power of re-entry is to the original vendor as owner of the rentcharge, and he has ceased to own the rentcharge: see Co. Lit., Bk. 3, ch. 5, s. 325, 201b. Under s. 1, sub-s. 2 (*e*), of the Law of Property Act, 1925, the list of legal estates which may subsist includes "rights of entry . . . . annexed, for any purpose, to a legal rentcharge."

At the most the plaintiff has only an equitable right of re-entry, and no legal estate in the land. But no equitable right is kept alive unless it is capable of taking effect as a legal estate, and it can only take effect as such if it is annexed to a legal estate: *Shaw* v. *Crompton.* (2)

In the case of *Barratt* v. *Richardson & Cresswell* (1) the facts were different. That was a case of landlord and tenant,

(1) [1930] 1 K. B. 686. (2) [1910] 2 K. B. 370.

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and the power of re-entry existed as long as there was a reversion in the landlord. If the reversion had gone, the power could not be exercised. The power of re-entry could not be reserved in gross or be divorced from the rentcharge. Under s. 1 of the Law of Property Act, 1925, the plaintiff has no legal right at all, but he might have a claim to an assignment: *Sutton* v. *Sutton*. (1) But if the power is not barred I ask for relief from forfeiture under the Law of Property Act, 1925, s. 146, or failing that, under the general equitable jurisdiction.

H. Johnston in reply. It makes no difference whether the plaintiff's right is legal or equitable. He had a right to re-enter for non-payment of rent in 1919, and that is enforceable at any time within twelve years. The action was brought within twelve years of the right accruing. Sect. 1 of the Law of Property Act, 1925, only defines what are legal and what are equitable estates and interests.

EVE J. In my judgment the plaintiff is entitled, on the admitted facts, to the relief he claims. The proviso gives him the right of re-entry in respect of each breach of the covenant to pay. It was so held by Lord Wright (then Wright J.) in *Barratt* v. *Richardson & Cresswell*. (2) That was a case between lessor and lessee. The latter covenanted to pay the rent quarterly on the usual quarter days, and it was provided that if and when any part of the rent should be in arrear for twenty-one days, whether legally demanded or not, it should be lawful for the lessor to re-enter on the premises. The lessor's right to re-enter first accrued to him in respect of the non-payment of rent on December 25, 1914. The action was brought in 1928. The decision was that, although the claim to possession was not made within twelve years next after the time at which the right to make such entry had first accrued, the lessor's claim to possession was not barred by s. 1 of the Real Property Limitation Act, 1874, and s. 3 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), but that his right to re-enter accrued

(1) (1882) 22 Ch. D. 511. (2) [1930] 1 K. B. 686.

afresh in respect of each subsequent quarter day, whenever any part of the rent reserved under the lease was in arrear for twenty-one days, and he was, therefore, entitled to rely on the last non-payment of rent before writ issued, or any previous non-payment up to twelve years before writ.

That decision appears to me to be entirely in point here. No distinction can be made between a rent reserved on a demise and a rentcharge reserved upon a grant of a fee simple, although it was suggested that the right of re-entry was annexed to the rentcharge, and that, inasmuch as the right to recover the rentcharge was barred, the right of re-entry ceased to be any longer enforceable. No decision in support of the suggestion was cited, and in my opinion it is inconsistent with the judgment in the case I have already dealt with.

Under the equitable jurisdiction of the Court relief can be granted, although none of the statutory provisions as to relief from forfeiture are applicable in the circumstances of this case.

I will grant relief on payment of ten years' arrears of rent, with interest at 4 per cent., less tax, the defendant executing at his own solicitor and client costs a deed granting a new rent to the plaintiff of 25*l.* per annum, issuing out of the houses and premises owned by the defendant.

Solicitors: *J. A. K. Ferns, Stockport; Grover, Smith & Moss, Manchester, for Brooks, Davies & Co., Stockport.*

H. L. L.

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May 9, 11; *June* 6.

In re VOCALION (FOREIGN), LIMITED.

(00868 OF 1931.]

Company—Company registered abroad—Company ordered to be Wound Up—Action against the Company commenced abroad—Sect. 177 *of the Companies Act,* 1929, *does not apply to Proceedings begun in a Foreign or Colonial Court—Equitable Jurisdiction in Personam of the Court of Chancery to restrain a Respondent properly served in Great Britain from proceeding with an Action brought in a Foreign or Colonial Court—Undesirability of Court exercising that Jurisdiction—Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 172 (*b*), 174, 177, 223, 344.

Sect. 177 of the Companies Act, 1929, only applies to proceedings pending in a Court of Great Britain and does not apply to proceedings pending in a foreign or colonial Court. The Court can, however, in the exercise of its equitable jurisdiction in personam restrain a respondent properly served in this country from proceeding with an action brought in a foreign or colonial Court to enforce a liability incurred abroad. But as against a respondent domiciled abroad, substantial justice is more likely to be attained by allowing the foreign proceedings to continue, and in such a case the Court will not as a rule exercise that jurisdiction.

THE Company was ordered to be wound up by the Court on January 11, 1932. Three summonses were taken out, one on February 12 and two on February 25 following. The first two were applications by the Official Receiver and the provisional liquidator of the Company; and by them orders were sought to restrain the respondent Bank of New South Wales from further proceeding without the leave of the Court with (1.) an action brought against the Company in the Supreme Court of Melbourne in the State of Victoria claiming payment of the sum of 2584*l.* 12*s.* 11*d.* and interest, and (2.) an action in the same Court, brought by the Bank against the Company and two gentlemen called Wharton and Gendle, claiming as against the Company and Gendle specific performance of an undertaking alleged to have been given by Gendle to give security for the debt claimed in the first action over the assets of the Company in Australia, and also claiming an injunction restraining all three defendants from disposing of the assets of the Company, and incidental relief. The third summons is an application by the Bank of New

South Wales for an order that, notwithstanding the order to wind up the Company, the Bank may be at liberty to proceed with the two actions in the Supreme Court at Melbourne. The first action will hereinafter be called the debt action, and the second the security action. The Bank was a corporation incorporated in Australia, where its principal business was situate, and having a place of business or branch in England at 29 Threadneedle Street in the City of London; and it was registered in England pursuant to s. 344 of the Companies Act, 1929. The Company, which was registered in England and was an English company, carried on business in Australia, both in Victoria and in New South Wales, and it was registered in Victoria as a foreign company on May 31, 1928, its registered agent being Gendle, then described as of 49 to 59 Coppin Street, Richmond, the ground floors of which were owned by the Company. Two powers of attorney, dated respectively May 4, 1928, and November 15, 1929, were given by the Company to Mr. Gendle. The debt sued for in the debt action was alleged to have been due for commission for work done by the Bank in Australia as banker for the Company and for money lent to the Company or paid at its request, and for interest. The writ in that action was duly served on the Company in London on November 5, 1931. The security action was an endeavour to obtain and to enforce a security over the freeholds (if any) and all other the assets of the Company. The alleged security was given by Gendle for and on behalf of the Company on March 10, 1930, and was in the form of an undertaking by the Company to give to the Bank such security for all moneys owing by the Company to the Bank over the freeholds (if any) and all other assets of the Company as the Bank might require whenever called upon so to do, and in the meantime not to pledge or in any way incumber or raise money on any of the said assets, except with the consent in writing of the Bank. The writ in the security action was never served on the Company. An ex parte injunction was, however, granted on December 17, 1931 (the date of the issue of the writ) purporting to restrain the Company and Gendle and Wharton and each of them

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from selling or dealing with the assets of the Company or any of them pending the giving of certain securities, or in any way dealing with any of the assets of the Company contrary to the rights of the plaintiff, and also from removing or causing to be removed out of the State of Victoria any of the assets of the Company or causing any of them to be removed to England, and from in any way pledging, incumbering, or raising money on any of the said assets, except with the consent in writing of the plaintiff.

The position with regard to the security action was somewhat involved. On March 1, 1930, the Company agreed to sell its leasehold land, buildings, plant, etc., and the whole of its undertaking in Australia to one Maurice Rosenthal for the sum of 65,000*l.* payable as to 5000*l.* in cash, as to 40,000*l.* by the issue to the Company of a first mortgage debenture of the nominal value of 40,000*l.* containing the usual charge, and as to 20,000*l.* by the allotment to the Company of 80,000 fully paid ordinary shares of 5*s.* each in the capital of a company to be formed by Rosenthal. The company was in fact duly formed in Australia under the name of Vocalion (Australasia), Ld. The debenture was granted to the Company, and on August 6, 1931, the Company appointed Wharton receiver under the debenture. On December 16, 1931, Wharton purported to sell all the undertaking and assets of Vocalion (Australasia), Ld., to a company called Merchandise Trading Company, Ld., for the sum of 4500*l.*, of which sum 1000*l.* was paid to Wharton, and the balance of 3500*l.* was due and payable at the date when the security action was commenced. Wharton was joined as a defendant in the security action on an allegation that he was endeavouring to defeat the rights of the Bank under the undertaking. The company called Merchandise Trading Company, Ld., had not been joined as a defendant in the security action, which claimed specific performance of the undertaking above mentioned, and an order that the defendant Company or the defendant Gendle, or some other fit and proper person, should execute a transfer or assignment by way of security to the plaintiff Bank of all rights in the lease and premises, a bill of

sale over the erections, works, machinery and plant on the premises, a transfer of all the Company's right, title and interest to the debenture over the assets and undertakings of Vocalion (Australasia), Ld., and other relief not limited to property in the State of Victoria. The undertaking to give security was not registered either in this country or in Australia. The debenture to secure the sum of 40,000*l.* granted by Vocalion (Australasia), Ld., was duly registered in the State of Victoria on August 9, 1930. The only fact with reference to the law of Victoria which was established before the Court was that by s. 101 of the Companies Act, 1928, of the State of Victoria, any mortgage or charge created by a company which was not registered in the office of the Registrar-General in manner provided by that section was void as against the liquidator and any creditor of the company, so far as any security on the company's property was concerned; and that by s. 7 of that Act the word "company" included a foreign company carrying on business in Victoria.

J. B. Lindon for the Official Receiver. The Court does not, as a matter of course, grant leave to proceed on applications such as that which the Bank is making here. The Court has equitable jurisdiction in personam to restrain the Bank from proceeding with this action: *In re Oriental Inland Steam Co.* (1); *In re North Carolina Estate Co.* (2); *In re Belfast Shipowners Co.* (3) This is a proper case for the Court to exercise its jurisdiction: *In re Oriental Inland Steam Co.* (1) There is a statutory trust for creditors under s. 189 of the Companies Act, 1929, and if an English Court has jurisdiction it ought not to allow one creditor to have a larger share of the assets than any other creditor. It is for the Bank to satisfy the Court that the case is one in which leave to appeal should be granted.

[He also referred to *In re International Pulp and Paper Co.* (4); *Moor* v. *Anglo-Italian Bank* (5); *In re Wanzer, Ld.* (6);

(1) (1874) L. R. 9 Ch. 557.
(2) (1889) 5 Times L. R. 328.
(3) [1894] 1 I. R. 321.
(4) (1876) 3 Ch. D. 594.
(5) (1879) 10 Ch. D. 681.
(6) [1891] 1 Ch. 305.

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Flack's Case (1); and *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* (2)]

Vanneck for the Bank. The real question for the Court to determine is whether when an English company, carrying on business abroad, enters into transactions abroad with a foreign company and then goes into liquidation in England, the Court will prevent the foreign company from taking proceedings in its own country. The Court cannot restrain proceedings taken in a foreign Court by a foreigner against an English company which has assets in the foreign country: *Carron Iron Co.* v. *Maclaren.* (3) The debts due in the foreign country prevail over the English debtors or debenture holders: *In re Maudslay, Sons & Field.* (4) The mere fact that the Bank has registered in this country is not sufficient to entitle the Court to prevent it from taking proceedings in the foreign country.

J. B. Lindon in reply. There is authority that the words of s. 177 apply to actions commenced abroad: see Chitty J. in *In re North Carolina Estate Co.* (5) The *Carron Iron* case (3) was before the Companies Act, 1862, and the company was not carrying on business in this country. The Bank in the present case has business and is registered in this country, and has some one who can be sued here. The Court therefore has jurisdiction, and ought to give effect to that jurisdiction by restraining a breach of trust.

[He also referred to *In re Boyse.* (6)]

Cur. adv. vult.

June 6. MAUGHAM J. In the circumstances of this case three questions, I think, arise for consideration. The first is whether s. 177 of the Companies Act, 1929, has any application to an action or proceeding in any Court other than a Court in Great Britain. The second question is whether, assuming that question to be answered in the negative, this Court can in the exercise of its equitable jurisdiction in personam restrain a respondent properly served in this

(1) [1894] 1 Ch. 369.
(2) [1927] A.C. 95.
(3) (1855) 5 H.L.C. 416.
(4) [1900] 1 Ch. 602.
(5) 5 Times L.R. 328.
(6) (1880) 15 Ch. D. 591.

country from proceeding with an action so brought. The third question is whether such a jurisdiction, if it exists, ought to be exercised in the circumstances of the present case.

Dealing with the first question, I should observe that s. 177 must be considered in connection with s. 172 (*b*) (which gives the Court power to stay or restrain proceedings other than proceedings in the High Court or the Court of Appeal in England or Northern Ireland against a company after the presentation of a winding-up petition), s. 174 (which renders void any attachment, sequestration, distress, or execution put in force against the estate or effects of the Company after the commencement of the winding-up), and s. 223, which provides for enforcement throughout the United Kingdom of orders made in winding-up. Now by the decision of the Privy Council in *New Zealand Loan and Mercantile Agency Co.* v. *Morrison* (1) it has been made evident that the various Companies Acts do not either by express words or by necessary implication extend to the Colonies, and that the said Acts were not intended to bind the Colonial Courts. The judgment of the Board points out the distinction in this respect between the Bankruptcy Acts and the Companies Acts. It is apparent then that in regard to the matters I have to consider the Supreme Court of Melbourne is in precisely the same position as a completely foreign Court, for instance, a Court in Russia or Turkey. It will be noted that s. 177 contains the words: "No action or proceeding shall be proceeded with or commenced against the company except by leave of the court," a phrase which seems to involve that the Legislature imagined that the winding-up order would probably become known to an intending plaintiff before commencing his action. If s. 174 is considered, it would seem to be impossible to hold that the Legislature intended to say that an attachment or distress or execution put in force under the jurisdiction of some foreign Court against the assets of a company in a foreign land should be void to all intents; and it may be observed that a provision of that kind would in almost every case be nugatory. But

(1) [1898] A. C. 349.

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apart from these considerations of the language of the relevant sections I think the observation of Mellish L.J. in *In re Oriental Inland Steam Co.* (1) is undeniable: "Of course," he says, "Parliament never legislates respecting strictly foreign Courts. Nor is it usually considered to be legislating respecting Colonial Courts or Indian Courts, unless they are expressly mentioned." Apart from authority, in my judgment it is reasonably clear that s. 177 has no application to actions or proceedings in foreign Courts. It seems to me impossible so to construe this, and the other sections, as to hold that they are limited either to British subjects who may be concerned with such proceedings or to persons who can be served with a summons in this country.

The authorities on this point are not perhaps wholly satisfactory; but in my opinion the Court of Appeal in the case mentioned (*In re Oriental Inland Steam Co.* (1)), did decide that the section in the Companies Act of 1862 was not applicable, though they thought fit in the circumstances of that case, and in the exercise of an equitable jurisdiction in personam, to prevent a creditor from obtaining the fruits of an attachment over certain property in India belonging to the Company. It will be noted that James L.J. did not refer to the section at all, and that Mellish L.J. clearly treated that section as not being applicable to proceedings in India. The dicta of Jessel M.R. in *In re International Pulp and Paper Co.* (2) seem to me to support the same view, for he gives reasons for supposing that the Companies Act, 1862, related to the whole of the United Kingdom and did not, as I understand the language he used, extend beyond it. In *In re North Carolina Estate Co.* (3) Chitty J. restrained a creditor from proceeding with an action in the Superior Court of Burke County, North Carolina, seeking to attach the property of the Company in that State. The learned judge made this observation (3), after referring to the decision in *In re Oriental Inland Steam Co.* (4): "It was quite true, as was said by Lord Justice Mellish, that Parliament did not

(1) L. R. 9 Ch. 557, 560.
(2) 3 Ch. D. 594, 599.
(3) 5 Times L. R. 328.
(4) L. R. 9 Ch. 557.

legislate for a foreign country. The point, however, was would the Court grant an injunction which was ineffectual, not as being against the foreign Court, but as being against a person who could not be reached ? Supposing, for instance, the case was one of a French creditor suing in a French Court, or of an American creditor in an American Court, the Court, of course, could not grant an injunction, the reason being that the order would be ineffectual. But here the creditor was within the jurisdiction of the Court, had come in under the winding-up order and claimed, and moreover was a British subject permanently residing here. He thought that the case quite fell within the decision in *In re International Pulp and Paper Co.* (1) The doctrine of the Court with respect to injunctions was that they were directed against the person. They were a personal remedy, and in the present case an order for an injunction would be an effectual order against the person sought to be restrained." There is, I think, a certain ambiguity in the report as to the reasons for the decision, but in my view the learned judge was simply enforcing the equity referred to in *In re Oriental Inland Steam Co.* (2), and was not purporting to decide that the section he had to deal with (s. 87 of the Companies Act, 1862) could be held to apply to foreign proceedings. The next case is *Flack's Case.* (3) North J. there purported to follow the authority of *In re Oriental Inland Steam Co.* (2), and I do not think there is anything in his judgment which conflicts with the view I have taken of the true construction of the sections. The last case I shall refer to on this point is the decision of the Court of Appeal in Ireland in *In re Belfast Shipowners Co.* (4) The Court included Walker L.C., Palles C.B., and FitzGibbon L.J., and the judgment of Palles C.B. begins with this observation in reference to s. 87 of the Act of 1862 as applicable to proceedings in the Superior Court of Massachusetts to attach certain sums the property of the company after a winding-up order (5) : " Although

(1) 3 Ch. D. 594.
(2) L. R. 9 Ch. 557.
(3) [1894] 1 Ch. 369.
(4) [1894] 1 I. R. 321.
(5) [1894] 1 I. R. 321, 332.

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s. 87 does not include Courts in foreign countries, I am of opinion that the Court, under its general jurisdiction, was competent to make an order against the appellants *in personam*, such as that now under appeal. The appellants, though resident in England, are clearly liable to this jurisdiction, as the Company is an Irish one, which can be wound up in this country only, and the appellants are the petitioners upon whose application the winding-up was directed to be continued under supervision. The only real question in the case is, not that of the jurisdiction, which is undoubted, but of its exercise." The conclusion therefore at which I arrive is that, upon principle and authority, s. 177 does not extend to the actions or proceedings which have been commenced in the Supreme Court of Melbourne.

The next question is, so far as I am concerned, determined by the authority of the Court of Appeal in the case cited: *In re Oriental Inland Steam Co.* (1) It was there held that as the effect of the Act of Parliament the assets of the company became subject to a statutable trust for creditors, and that (as a general rule) so far as the British Court has jurisdiction no one creditor ought to be allowed to have a larger share of the assets than any other creditor. The respondent having been registered here under s. 344 of the Companies Act, 1929, is properly brought within the jurisdiction of the Court, and I have no doubt that, following the decision of the Court of Appeal, this Court has jurisdiction to grant an injunction restraining the prosecution of the proceedings in Melbourne by an injunction operating in personam on the grounds given in the various cases above referred to. The real question in the case, to borrow the language of Palles C.B., is not that of the jurisdiction, which is undoubted, but of its exercise. This question is, I think, one of considerable difficulty and importance.

It will be convenient in the first instance to consider the question apart from the effect of s. 344 of the Companies Act, 1929, that is on the assumption that the Court is dealing with an application for an injunction to restrain a

(1) L. R. 9 Ch. 557.

foreign corporation properly served within the jurisdiction from endeavouring by proceedings in its own Courts brought to enforce payment of a debt notwithstanding the liquidation in this country. It would be difficult to distinguish such a case from the position that would arise if the respondent were not a corporate body, but a person domiciled abroad temporarily resident in this country. Would it be right to restrain such a corporation or such a person from exercising such rights of action as may exist in the foreign country? It must be observed in the first place that an injunction in such circumstances might well be ineffectual: for the respondent if a corporate body might cease to carry on business in the jurisdiction and remove its assets, and the same might take place in regard to a respondent individual. The Court in general is very reluctant to exercise a jurisdiction in personam against a foreigner in relation to a matter in which there cannot be an effective order. It may be added that the Court ought to be satisfied before making the order that it will not hesitate if the order is disobeyed to commit or sequestrate the property of the person or company in default.

In the second place it must be remembered that foreign creditors of a company in liquidation, not being within the jurisdiction of the Court, cannot be restrained from taking such proceedings as they may be advised in their own country; and the only result of an injunction to restrain a particular creditor who can be sued in this country from exercising the rights which the laws of his country would give him, may be to benefit other foreign creditors without in any way increasing the amount of the assets ultimately distributable in the liquidation in this country.

Next it is to be noted that the rights of creditors in foreign countries, for instance, in France and Germany, are often more extensive as against their debtor and his assets than they are in this country. For example, they often include a right to hold up, so to speak, both the movable and immovable estate of the alleged debtor before judgment so as to make it available for the payment of the debts when

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established, a process resembling to some extent the letters of inhibition and arrestment which, as I understand it, may be issued in Scotland in a proper case. It may well be that credit has been given to a debtor by creditors within a foreign jurisdiction in reliance upon the former's known possession of available assets, movable or immovable, capable of being seized or attached. It does not seem to me to be in consonance with the principles of equity to restrain one or more of such creditors who happen, perhaps by accident, to be subject to the jurisdiction of this Court from exercising the rights given to them in the country where they reside and carry on business, as against a company which also carried on business there, and was thus subject to the foreign law. Further, it is to be remembered that an incumbrancer of immovable property situate in a foreign country will not be restrained by injunction from prosecuting proceedings to enforce his security in that country even though the mortgagor is a company in the course of liquidation (see *Moor* v. *Anglo-Italian Bank* (1)), and that even though the incumbrancer is a British subject or a corporation resident in this country. Some at least of the reasons given by Sir George Jessel in deciding that case appear to me to be applicable to movable as well as to immovable property ; for it seems that a creditor who has obtained in a foreign country security on personal property ought not in equity to be deprived of his rights because of a supervening statutable trust for creditors of a debtor.

Next it should be observed that questions of evidence, of priority, of statutes of limitation, and of set-off must depend on the lex fori, which may well differ from the law of this country, and it would not appear to be fair or just to deprive foreign creditors of any rights which they may have in the foreign country against a company which has carried on business there merely because a summons can properly be served upon them here.

Finally it must be remembered that there may be winding-up orders made in the foreign country where the company has

(1) 10 Ch. D. 681.

carried on business and possesses assets. The view of this Court is that the principal winding-up should be in the principal domicil of the Corporation, and that any other winding-up order should be ancillary to the principal winding-up: see Orders and Cases referred to in Palmer, Part II., Winding-up, 13th ed., at pp. 150–1, and see *In re Commercial Bank of South Australia.* (1) The effect of one winding-up being ancillary to the principal winding-up has not, I think, been much considered in our Courts. This Court no doubt holds that in the winding-up here all creditors, whether British or foreign, who can prove their debts have equal rights; but it would seem that foreign Courts do not always take the same view (see *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* (2), where the liquidation of the company in Russia was treated as valid in the House of Lords, though no provision had been made for English claims).

If there are two winding-up orders, one here and one abroad, it would seem to be impossible to contend that a foreign creditor is not to be allowed to prove his debt abroad and, if the lex fori permits it, to bring an action abroad. In *Antony Gibbs & Sons* v. *La Société Industrielle et Commerciale des Métaux* (3), the facts were that the defendants, a French company, had been the subject of a judgment of judicial liquidation pronounced by a French tribunal; yet the Court of Appeal held that a party to a contract made and to be performed in England could properly sue the French company (who had an office here) in England. This is in a sense the converse of the present case, and the judgments tend, I think, strongly to support the view that this Court ought not to restrain a foreigner from securing in a foreign country such rights in respect of a contract made and to be performed there as the lex fori will give him. The case was cited with approval by Lord Davey in delivering the judgment of the Privy Council in *New Zealand Loan & Mercantile Agency Co.* v. *Morrison.* (4)

Turning now to the authorities on the question whether the jurisdiction should be exercised, there is an important

(1) (1886) 33 Ch. D. 174.
(2) [1927] A. C. 95.
(3) (1890) 25 Q. B. D. 399.
(4) [1898] A. C. 349.

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statement of Cranworth L.C. in *Carron Iron Co.* v. *Maclaren.* (1) It was a case where there had been a decree for administration of the estate of one Henry Stainton who died possessed of considerable real and personal property in both England and Scotland. He had been the London manager of the Carron Iron Company, and apparently owed them at the date of his death a very large sum which they sought to obtain by proceedings in Scotland. The Carron Iron Company had agencies and valuable assets in this country, and an application was made in England for an injunction to restrain the company from further proceeding in Scotland in their suit. The injunction was granted, but the company appealed to the House of Lords. Lord Cranworth delivered the leading judgment and, after showing that there was clear jurisdiction in the Court of Chancery to restrain persons within its jurisdiction from instituting or prosecuting suits in foreign Courts, he proceeded to consider whether such an injunction ought to be granted in the circumstances of that case. After mentioning the reported cases he remarked as follows (2): "The result of the authorities is, that if the circumstances are such as would make it the duty of the Court to restrain a party from instituting proceedings in this country, they will also warrant it in restraining proceedings in a foreign Court. But though they will justify such a course, yet they will not, as I apprehend, make it the duty of the Court so to act, if from any cause it appears likely to be more conducive to substantial justice that the foreign proceedings should be left to take their course." He then considered the facts of that case, pointed out the difference in many respects between the foreign laws relating to creditors and those of this country, and came to the conclusion that the injunction ought to be dissolved and the foreign corporation allowed to prosecute its own remedy in its own jurisdiction as it might think fit. Lord Brougham came to the same conclusion. Lord St. Leonards in his dissenting judgment placed great reliance on the fact that the company was not only within the jurisdiction of the English Court but was a

(1) 5 H. L. C. 416. (2) 5 H. L. C. 416, 439.

Scotch corporation; and I do not read his judgment as indicating that he would have differed from Lord Cranworth if the corporation had been truly a foreign corporation.

In the case of the *International Pulp and Paper Co.* (1) the injunction, as I have said, was to restrain proceedings in Ireland. In *In re North Carolina Estate Co.* (2) the injunction was against a British subject permanently residing in this country. In *In re Wanzer, Ld.* (3), the only question was as to the validity of a sequestration in Scotland. In *Flack's Case* (4) the motion was against an English creditor residing in this country, and the order preserved for him such security as he had by the effect of the foreign judgment. In the Irish case, *In re Belfast Shipowners Co.* (5), the persons restrained from proceeding in Massachusetts were not only British subjects resident in England, but they were actually petitioners upon whose application the winding-up was directed to be continued under supervision. I have been unable to find any case in which the Court in the exercise of its jurisdiction in personam has restrained a foreigner or a foreign corporation from exercising his or its rights in a foreign Court in relation to a contract to be performed abroad on the ground that there has been a winding-up order in this country.

I will add that the propositions contained in ss. 142 and 143 in Westlake's Private International Law, 7th ed., p. 183, seem to me to be substantially correct, and to tend to the same conclusion, though the somewhat ancient cases cited are not, I think, wholly satisfactory as authorities for the propositions to their full extent; and it must be remembered, as pointed out in Dicey (Conflict of Laws, 5th ed., p. 376), that the principles applicable to the winding-up of a company differ materially from those affecting bankruptcy. I can find, however, no reason to doubt that a person domiciled abroad can sue in his own Courts a company which, in carrying on business there, has incurred a debt or liability to him,

(1) 3 Ch. D. 594.
(2) 5 Times L. R. 328.
(3) [1891] 1 Ch. 305.
(4) [1894] 1 Ch. 369.
(5) [1894] 1 I. R. 321.

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whether or not that company is being wound up in this country, to which he owes no allegiance and with the laws of which he is not acquainted; though, as pointed out in Dicey, p. 377, if he desires to benefit under the English winding-up he must, generally speaking (see for an exception *Moor* v. *Anglo-Italian Bank* (1)), give up for the benefit of other creditors any advantage which he may have obtained for himself by the proceedings abroad. If these views be well founded it is difficult to see why an English Court should attempt to restrain such a creditor from enforcing his rights in his own country merely because it is possible to serve him with process here. To prevent a misconception I should point out that I am not here dealing with the case of a British subject or a corporation incorporated under our law, nor am I dealing with the case where the person sought to be restrained from proceedings abroad has made himself a party to the proceedings in the liquidation, for instance by putting in a proof or in some other way.

For these reasons I think that in such a case, and on the hypothesis I am dealing with, the Court ought prima facie not to exercise the equitable jurisdiction which, as I have held, exists, for the reason that in general it will be more conducive in such a case to substantial justice that the foreign proceedings should be allowed to proceed. Then does it make any difference that the respondent Bank in the present case is registered in England pursuant to s. 344 of the Companies Act, 1929, which takes the place of s. 274 of the Act of 1908? It has been settled that such a registration amounts to a submission to the jurisdiction of the Courts in this country (*Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* (2)), and no doubt the Bank has a place of business in London, and may properly be sued in this country. It does not seem to me to follow that a foreign corporation in this petition ought to be treated differently from any other foreigner who can be properly served in this country, so far as concerns the exercise of the jurisdiction in personam which I am now asked to exercise. In considering

(1) 10 Ch. D. 681. (2) [1927] A. C. 95.

this question I must assume that the Supreme Court at Melbourne will properly deal with the matter, and will not disregard so far as it may be material the legal effects of the liquidation of the Company and the trust for creditors which has been thereby established; and it should be noted that the injunction was granted by that Court before the liquidation in this country. Moreover, although it is asserted on behalf of the applicants that the leaseholds of the Company have been agreed to be sold, there is no evidence that the sale has been completed; and further it is possible that the proceeds of sale so far as they can be reached ought to be regarded in the circumstances as subject to the lex situs just as if the sale had not taken place, and to that extent, at any rate, the decision in *Moor* v. *Anglo-Italian Bank* (1) would be an authority for allowing the respondents to have their rights finally settled by the Melbourne Court. So far as I can judge on the materials before me the Bank will have considerable difficulty in establishing its alleged rights, having regard to the non-registration of the undertaking to give security and to other circumstances adumbrated in the affidavits; but I do not conceive that I have any sufficient ground for holding that the proceedings must necessarily fail or are brought otherwise than in good faith. On the whole I have come to the conclusion that the Court ought not to interfere in the circumstances of this case with either the debt action or the security action. The summonses by the Official Receiver must be dismissed, and leave must be given to the Bank on the third summons to proceed with the actions in the Supreme Court at Melbourne.

The Bank should have its costs of all three summonses, and the liquidator, who has properly raised the question here, will have his costs out of assets available in the liquidation.

Solicitors for the liquidator: *Lawrence Jones & Co.*
Solicitors for the Bank: *Markby, Stewart & Wadesons.*

(1) 10 Ch. D. 681.

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In re SCIENTIFIC POULTRY BREEDERS' ASSOCIATION, LIMITED. (1)

Company—Limited by Guarantee—Promotion of scientific Object—Prohibition of Distribution of Profit—Proposed Remuneration of Members of Governing Body—Alteration of Objects—No Jurisdiction to sanction—Change in Constitution of Society—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *ss.* 4, 5, 18.

An association formed and registered under the Companies Act for the promotion of a scientific object, the memorandum and articles of which prohibit the payment of any remuneration to, or the division of profits among the members of the governing body, cannot by a petition for alteration of objects presented under s. 5 of the Act obtain the sanction of the Court to an addition to the objects clause of the memorandum, or to a proviso to one of the articles which would enable the members of the governing body to receive remuneration for their services. The Court cannot sanction alterations which are inconsistent with and would wholly transform the original objects of the society.

In re Society for Promoting Employment of Women [1927] W. N. 145 followed.

PETITION.

The Scientific Poultry Breeders' Association was registered in 1929 as a company limited by guarantee, with the object of improving breeds of poultry, and promoting more scientific methods in feeding, housing and breeding poultry. The memorandum was framed with the object of obtaining the licence of the Board of Trade to dispense with the use of the word "limited," and an application was made for that purpose; but owing to one of the clauses in the memorandum it did not succeed. The memorandum at present prohibited the payment of any remuneration to or the division of any profits among the members of the governing body, and provided that no member of that body should be appointed to a position on the salaried staff.

The business and membership of the society had now so greatly increased that the members of the governing body found that they were unable to give the necessary time to the work of management unless they were paid. Alterations in the memorandum and articles of association to enable such members to be remunerated for their services, details

(1) Reversed in C. A., October 18, 1932.

of which are set out in the judgment, were then proposed and approved by the members of the society in general meeting. This petition was presented under s. 5 of the Companies Act, 1929, to obtain the approval of the Court to the alterations.

F. R. Evershed for the petitioners. The alterations proposed are necessary to enable the company to carry on its business more efficiently, or to attain its main purpose—the improvement of poultry breeding—by new or improved means, and come under s. 5, sub-s. 1 (*a*) or (*b*).

[He referred to *In re Society for Promoting Employment of Women* (1) and *Incorporated Glasgow Dental Hospital* v. *Lord Advocate.* (2)]

Cur. adv. vult.

July 19. EVE J. The association was registered in January, 1929, as a company limited by guarantee, with the primary object, as indicated by its name, of encouraging and improving the breeding of poultry and promoting the use of better and more scientific methods of breeding, feeding and housing poultry by breeders, farmers, and members of the poultry industry generally.

The memorandum was framed with the intention to apply in due course for an order dispensing with the use of the word "limited" as part of the company's title, and an application was duly made for such dispensation, but it did not succeed owing to the presence in clause 3 of a sub-clause (k), whereby the company was empowered: "To establish, manage, supervise or conduct any scheme or schemes by which members of the association may be enabled to buy or sell to the best advantage poultry, poultry produce, poultry food, and other things of any kind relating to the poultry industry."

The object of the pending application is to obtain confirmation by the Court of a special resolution altering the memorandum of association with respect to its objects in order to enable it to carry on its business more efficiently.

(1) [1927] W. N. 145. (2) 1927 S. C. 400.

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The alteration is one which contemplates an addition to the objects specified in clause 3 of the memorandum, of a sub-clause in these terms: "To remunerate members of the association and of the Council or Governing Body of the association and others for work done or services rendered for the association."

The reason for the proposed addition is the large increase in the society's membership and business and in the time and attention which the members of the Council by whom its affairs are managed are called upon to devote to those affairs. Hitherto these services have been given gratuitously, but a condition of things has now been reached where in the opinion of the members generally it is felt that the members of the governing body should be remunerated for their services.

The evidence discloses a position which justifies the proposal and goes to prove that if effect be given to it the change will be calculated to enable the business of the petitioners to be carried on more efficiently.

But it involves something more than the addition of the suggested sub-clause to clause 3 of the memorandum, for in view no doubt of the contemplated application to dispense with the word "limited" there was inserted another clause in the memorandum, clause 4, which is to the following effect, taking para. 1 first. It is not divided into paragraphs, but it is as well that I should mention the fact that there are two paragraphs in order that the references may be understood.

Para. 1 of clause 4 is this: "The income and property of the association, whencesoever derived, shall be applied solely towards the objects of the association as set forth in this Memorandum of Association, and no portion thereof shall be paid or transferred, directly or indirectly, by way of dividend, bonus or otherwise howsoever by way of profit, to the members of the association."

Pausing there, the resolution that the Court is now asked to confirm proposes to insert this proviso at the point down to which I have read: "Provided that nothing herein shall prevent any member of the association deriving any profit or other advantage out of the funds of the association or

otherwise from or under any scheme or schemes established under clause 3, sub-clause (k) hereof."

Then clause 4 goes on as follows. It is a qualification or limitation introduced after the first paragraph, and it says: "Provided that nothing herein shall prevent the payment, in good faith, of reasonable and proper remuneration to any officer or servant of the association, or to any member of the association in return for any services actually rendered to the association, nor prevent the payment of interest at a rate not exceeding 6 per cent. per annum on money lent or reasonable and proper rent for premises demised or let by any member of the association, but so that no member of the Council of Management or Governing Body of the association (other than such officers, if any, as the Council may co-opt as members thereof) shall be appointed to any salaried office of the association or any office of the association paid by fees, and that no remuneration or other benefit in money or money's worth shall be given by the association to any member of such Council or Governing Body, except repayment of out-of-pocket expenses and interest at the rate aforesaid on money lent or reasonable and proper rent for premises demised or let to the association; Provided that the provision last aforesaid shall not apply to any railway, gas, electric lighting, water, cable or telephone company of which a member of the Council of Management or Governing Body may be a member, or any other company in which such member shall not hold more than one-hundredth part of the capital, and such member shall not be bound to account for any share of profits he may receive in respect of any such payment."

This second paragraph is sought to be dealt with as follows: In the third line thereof by inserting immediately after the words "or servant," the words "or member of the Council or Governing Body," which enables the payment of moneys to be made to the members of the Governing Body or the Council; and by deleting from such paragraph the whole of the words commencing in the seventh line with the words "but so that no member" down to the end of the paragraph.

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So that para. 1 of this clause 4 is amended by the insertion of the proviso which I have mentioned, and the rest of the clause is practically struck out except in so far as it authorizes something new, that is to say the payment of members of the Council.

These alterations if acceded to will bring about fundamental changes in the constitution of the association. It will no longer be a body of which the income and property is applicable solely to the promotion of the objects set forth in the memorandum. Under the first of the proposed alterations it will be within the capacity of the members to establish any scheme or schemes under clause 3, sub-clause (k), the scope of which is by no means easy to determine, and to divert into their own pockets the profit or other advantage out of the funds of the association or otherwise, which is language again of a rather vague character.

The Court is asked to sanction the application of a new principle—namely, the payment of members of the committee of management. By the second of the proposed alterations the whole status of the governing body is transformed. Each member of the Council of Management surrenders his voluntary service and becomes a paid agent of the association.

I am not for a moment suggesting that these changes in the constitution of the association are otherwise than desirable; still less must I be taken as suggesting that they are put forward otherwise than in perfect good faith, but the question is, have I any jurisdiction to confirm them under s. 5 of the Companies Act?

Sect. 4 enacts that a company may not alter the conditions contained in its memorandum except in the cases, in the mode, and to the extent for which express provision is made in the Act. By s. 5, the mode in which, and the extent to which, the objects of the company may be altered are laid down. I need not read the whole of the section, but it commences in this way: "Subject to the provisions of this section"—that is, subject (inter alia) to those provisions which require that the alteration should be confirmed by the Court—"a company may, by special resolution, alter the

provisions of its memorandum with respect to the objects of the company, so far as may be required," and then I need only read this—"to carry on its business more . . . . efficiently."

The question that I have to determine is: Can the provisions of clause 4 of the memorandum in this case be regarded as provisions with respect to the objects of the company? They are provisions which in my opinion are fundamental in character. I do not think that they can be regarded as provisions with respect to the objects of the company. It cannot be ignored that if they cease to operate, the company will have got rid of these fundamental characteristics by the expedient of inserting amongst its objects a new object inconsistent with and indeed contrary in spirit to the provisions of this particular clause of the memorandum.

I am not suggesting that one must always restrict "provisions of the memorandum with respect to the objects of the company" to provisions to be found in what is called the objects clause of the memorandum. There may be cases in which one might find, in subsequent clauses of the memorandum, provisions which one could rightly and properly regard as having sufficient connection with the objects clause to justify the Court in sanctioning a change in those subsequent clauses in order to bring them into harmony with the main objects of the company; but I cannot bring myself to hold that this is so in this instance.

I think the case falls within the decision of Russell J., as he then was, in *In re Society for Promoting Employment of Women* (1), where the paragraph which it was sought to strike out of the memorandum was not one which in his opinion could properly be regarded as one with respect to the objects of the company.

On the other hand, in the Scotch case of *Incorporated Glasgow Dental Hospital* v. *Lord Advocate* (2) a different conclusion was arrived at, and the Court treated clause vi. of the memorandum as supplemental to and explanatory of

(1) [1927] W. N. 145. (2) 1927 S. C. 400.

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the objects clause, and therefore as one which could properly be regarded as one with respect to the objects.

There clauses iv. and vi. of the memorandum were directed to the same ends as were the clauses bearing the same distinctive numbers in the English case, but the former was qualified by a proviso to the effect that, subject to the provisions of clause vi. as to payment to members of the Committee of Management or Governing Body, nothing therein contained should prevent payment in good faith of remuneration by way of endowment, grant, salary or fees to any professors, lecturers, surgeons, teachers, officers or servants of the hospital, notwithstanding they might be members of the association, in return for any services actually rendered to the association, and to clause vi. were added two provisions—not to be found in the English case—the first that lecturers in dental subjects, whether members of the Committee of Management or Governing Body or not, might receive and retain for their own use fees from students attending their lectures, and the second that not more than three members of the Committee of Management or Governing Body should at one time be in receipt of fees.

The special resolution which the Court was asked to confirm provided for the addition to the objects clause of a sub-clause enabling the hospital to pay an honorarium to the Dean and the substitution of five instead of three as the maximum number of members of the Committee of Management or the Governing Body who should at one time be in receipt of fees.

The Court felt no difficulty in confirming the resolution so far as it dealt with the Dean, and starting from the standpoint that as regards the increase from three to five it was not being asked to sanction the application of a new principle—payment of members—but rather to extend a principle already in vogue, came to the conclusion that the provisions of clause vi. were inseparable from, incidental to, and indeed exegetical of clause iii., and therefore could properly be regarded as provisions in a clause relating to the objects of the company.

I do not feel that the decision in that case governs this one, where I am asked to confirm an alteration which in my opinion operates clearly to destroy certain of the essential attributes of the company and to make alterations—there are two of them—which are not alterations in respect of the objects, but alterations going to the real constitution and the fundamental objects of the society; and much as I regret that the society should be put to further expense and further trouble, I do not feel justified in making any order on the petition the effect of which would be to bring about a new state of affairs, and all I can do is to say that there will be no order on the petition.

Solicitors: *Finnis, Downey, Linnell & Chessher.*

H. L. L.

In re LADD.

HENDERSON *v.* PORTER.

[1932. L. 917.]

Will—Construction—Testamentary Appointment of Settlement Funds to Husband—"To the intent that this my Will shall take effect, whether I survive or predecease my Husband"—Death of Appointee before Testatrix—Absence of Substituted Appointee—Lapse.

A wife, who was of illegitimate birth, having under the trusts of her marriage settlement, made in 1892, a general testamentary power of appointment in default of issue, by her will in express exercise of that power and "to the intent that this my will shall take effect, whether I survive or predecease my husband" appointed the residue of the settled funds, after payment thereout of her debts and some legacies, to her husband for his own use and benefit absolutely. Her will contained no other disposition than the appointment. Her husband having predeceased her and she having died on March 11, 1932, childless:—

Held, that, even assuming the testatrix knew that, if she died childless and her husband predeceased her, the settlement funds would in consequence of her illegitimacy pass to the Crown, the prefatory words were ineffectual to appoint the residue of those funds to the executors of the husband, so as to make it part of his estate, and that the appointment failed by lapse.

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ADJOURNED SUMMONS.

By an indenture of settlement made on November 1, 1892, between Fearn Ladd (therein and throughout called Frederick Ladd) of the first part, Jane Ladd (then Jane Saunders, spinster) of the second part, and trustees of the third part, in consideration of the marriage then intended and shortly afterwards solemnized between Fearn Ladd and Jane Saunders certain funds and securities were settled by the husband upon trust to pay the income to the wife during her life and after her death in trust for the children or remoter issue of the marriage and in default of any child or children of the marriage upon such trusts as the wife should by will notwithstanding her coverture appoint and in default of such appointment and so far as such appointment should not extend in trust for the wife her executors administrators and assigns if she should survive her then intended coverture, but if she should die during the coverture then in trust for the two persons who were the trustees of the settlement, the parties thereto of the third part, in equal shares absolutely.

On March 4, 1903, Mrs. Jane Ladd made her will in the following terms: "in exercise of the power given to me by the indenture of settlement"—then followed the date and the names of the parties thereto—"being a settlement made in consideration of the marriage then intended and shortly after solemnised between the said F. Ladd and myself and in exercise of every other power enabling me in this behalf and 'to the intent that this my will shall take effect whether I survive or predecease my husband' I hereby appoint that in case of such default or failure of issue of my marriage as in the said indenture of settlement is mentioned all the property monies stocks funds and securities comprised in and which are now or may at any time hereafter become subject to the trusts of the said indenture of settlement or by law vested in the trustees or trustee thereof shall upon my death and such default or failure of issue as aforesaid be held by the said trustees or trustee of the said indenture upon trust to pay my debts and funeral and

testamentary expenses and to pay or retain all monies which have at any time heretofore been or may at any time hereafter be paid or advanced out of the corpus of the said trust property monies stocks funds and securities at my request and by my authority And upon further trust to pay or retain the following legacies"—then there followed three legacies amounting together to 800*l.*—"and to pay the ultimate residue and remainder of the said trust property monies stocks funds and securities, after paying or retaining the said monies and legacies or sums, to my husband the said Frederick Ladd for his own use and benefit absolutely."

Mr. Fearn Ladd died on September 8, 1929, having by his will dated January 21, 1928, given the residue of his estate to the defendant Laura Alice Porter and two other persons in equal shares and appointed Henry Wren Henderson executor thereof. The will was not proved, because, apart from any property which the testator might have taken under the testamentary appointment by his wife, he had no property of his own to bequeath.

On March 11, 1932, the testatrix, who continuously since the year 1918 had been of unsound mind, died without having had issue.

At the time of her death the property subject to the trusts of her marriage settlement consisted of 2270*l.* 5 per cent. War Stock and some cash which was after her death expended in the payment of funeral and testamentary expenses including estate duty.

The question raised on an originating summons by the trustees of the settlement was whether, upon the true construction of the will of the testatrix and in the events which happened, the appointment therein contained of the ultimate residue of the trust funds subject to the settlement in favour of her husband took effect, notwithstanding that he predeceased the testatrix.

In consequence of the illegitimate birth of the testatrix, the Attorney-General was made a defendant; and, the will of the husband not having been proved, Mrs. Laura Alice Porter, one of the residuary legatees thereunder, was

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appointed to represent the estate of the testatrix's deceased husband.

G. E. Timins for the plaintiffs.

W. F. Waite for the defendant Mrs. L. A. Porter. The testatrix knew at the time she made her will that, if there were no children of her marriage and her husband should die before her, the Crown would succeed to the settlement funds. It is a question of intention. Her will coupled with all the circumstances of this case show a clear intention on her part to benefit her husband's estate in the event of his predeceasing her. *Stevens* v. *King* (1) shows that where a testatrix intends to discharge a moral obligation, there will be no lapse. There is sufficient in this appointment to substitute a gift to the executors of the husband in case he should predecease the testatrix: *Sibley* v. *Cook*. (2)

Stafford Crossman for the Attorney-General. It is not enough merely to exclude the possibility of lapse, but it is necessary to indicate clearly who is to take under the appointment in substitution for the legatee in the event of his death before the testator: *Browne* v. *Hope* (3); *In re Greenwood* (4); Farwell on Powers, 3rd ed., p. 281; Jarman on Wills, 7th ed., p. 400. In *Sibley* v. *Cook* (2) there was a legacy to Ann Wensley "and to her executors or administrators" with a provision against lapse in case of her death before the legacy became due and payable. The special words used by the testatrix "to the intent that this my will shall take effect whether I survive or predecease my husband," do not necessarily show that she intended by them to exclude a lapse; the words may have been inserted for other reasons. The effect of the words is that the will as a whole is to take effect whether the testatrix should survive or predecease her husband. In Key and Elphinstone's Precedents (1914), 10th ed., vol. ii., p. 1010, the same words are used in the will of a married woman exercising a general power of appointment by will given to her, in default of issue under her

(1) [1904] 2 Ch. 30.
(2) (1747) 3 Atk. 572.
(3) (1872) L. R. 14 Eq. 343, 347.
(4) [1912] 1 Ch. 392.

marriage settlement under the trusts of which the settled property was to go, if the wife should predecease her husband, as she should by will appoint and if she should survive then to her absolutely.

CLAUSON J. This case seems to me to be one of considerable difficulty, and it is with some hesitation that I have come to the conclusion which I propose now to express.

When Jane Ladd made her will, her husband was alive and she had no children. I was given to suppose that at that time she was unlikely to have children; but be that as it may, the point is not of much importance, because it is pretty obvious that she made her will on the footing that there were not going to be any children.

At the same time, under a marriage settlement, which had been made some eleven years before, her property—it is suggested, and I will assume, correctly, practically the whole of her property—had been settled on what one may call the normal marriage settlement trusts with the provision that if there should be no child who should attain the age of twenty-one years, or being a daughter, should marry, the property was to be held upon such trusts as she should by her will, notwithstanding her coverture, appoint, and in default of such appointment, and so far as such appointment should not extend, in trust for her executors, administrators and assigns, if she should survive her then intended coverture, but if she should die during her then intended coverture, then to two gentlemen therein named. Although I confess I am not clear which way this operates, for the purpose of deciding this case I will assume and take into account that this lady was fully aware that, if she died intestate without children or husband, her property would pass to the Crown.

In those circumstances she makes this will, and it is a will which is entirely confined to exercising her power of appointment under the settlement. The will does not, as might have been expected in the circumstances, contain any residuary clause or deal with any property other than that comprised in the settlement. It is that circumstance which

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prompted me to make the remark just now that I am by no means sure which way I ought to be influenced by the fact, if it be the fact, as I assume it to be, that she was aware of her peculiar position as regards what would occur, in case she died intestate without husband or children.

On March 4, 1903, Mrs. Jane Ladd made her will, which she declared to be her last will. [His Lordship then read the will verbatim, and continued :] Having made her will in 1903, some time in the year 1918, she became of unsound mind. Her husband made his will in 1928 and died in 1929. His will has not been proved, because unless he gets some benefit by virtue of his wife's will, his estate is of a negligible amount. But I have before me a lady who will benefit under the will, and I have been asked, and I propose, to appoint her to represent the estate of the husband.

The testatrix died on March 11, 1932. But for the presence in the will of the words "and to the intent that this my will shall take effect, whether I survive or predecease my husband" the case would, I conceive, be perfectly plain. This would be an appointment by will in favour of a person who at the moment of its becoming operative by the death of the testatrix was not there to receive the benefit. The appointment would be wholly ineffective. The will would be effectual as regards the trust to pay her debts, and so forth, out of the marriage settlement fund and would be perfectly effectual so far as it relates to the provision for payment of the legacies, provided, of course, that the legatees were present to receive them. But the ultimate appointment in favour of the husband would simply fail, because he is not there.

Now notwithstanding that that is the frame of the will, if I can find in the will a clear intention that a particular gift shall not lapse, but shall operate to take the subject-matter of the gift away from those who would take on an intestacy, and if I can further find that the testatrix has not only intimated a desire that the gift shall be effectual, but has pointed out to whom the gift is to go, then, no doubt, in that case, if those indications of intention apply to the ultimate

residuary gift, the ultimate residuary gift would not lapse, but the residue would pass to the person to whom the testatrix had indicated her intention that it should pass, in the event of the original gift failing by lapse. Sometimes a gift is protected from lapse and made effectual in favour of some other person by the use of expressions which show that the intention was to benefit the estate of the legatee, and not merely the legatee personally. Thus, in one case, in certain circumstances, where the gift was to A. or her executors or administrators, the Court held that the gift was preserved from lapse by the death of the donee, and that donees had been effectually pointed out and substituted —namely, the executors or administrators of the deceased donee who would have taken had he survived. There have also been cases where the testatrix has intimated an intention that the gift should operate as if the primary donee had survived and had taken the gift but had died immediately afterwards, which, of course, is only another way of pointing out the executors or administrators of the original donee as the persons to be substituted in place of the donee, the gift to whom has lapsed.

Now can I find in these words—and if I am to find it at all it must be in these words—" to the intent that this my will shall take effect, whether I survive or predecease my husband " anything to satisfy me, first of all, that the gift to the husband was not intended to lapse, and, secondly, that the gift to the husband was intended, should he predecease the testatrix, to go to his executors as part of his estate ? I have already mentioned that in the circumstances, should my decision be against the husband, the result will benefit the Crown, but, of course, I must construe this will without regard to the fact that should the claim on behalf of the husband's estate fail, the result will be a windfall for the Crown ; I must construe it just as I should construe it, if the effect would be otherwise. I feel it is quite impossible so to construe these words as to give the will an effect which would save the residuary appointment for the benefit of the estate of the husband. If the words had been

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that the residuary gift was to take effect whether the testatrix survived or predeceased her husband, the matter, of course, would be much easier. But all that is said is that the will is to take effect whether she survives or predeceases her husband. I do not find it possible to spell out of those words an effective intention that her husband's estate should take the benefit of the bequest in case he were to predecease her. It has been pointed out to me that in certain books of precedents this form of words still survives and is used, because before certain changes in the law, many years ago, in certain comparatively rare circumstances, these words might have a particular operation which has nothing to do with the doctrine of lapse. I doubt myself whether it is quite legitimate that I should have regard to any such argument as that. It is dangerous, I think, to begin construing the testatrix's gift by speculation as to whence the form might or might not have been copied, and, accordingly, I attach no importance to that at all. What I do rely upon in deciding this case is that those words are not to my mind sufficiently clear to enable me to say that there is an effective gift in this will to the executors of the husband as part of his estate, so as to deprive those who would take on an intestacy of that which is the subject-matter of the suggested gift, and, accordingly, in my view, I am bound to hold that, on the true construction of the will, the appointment therein contained of the residue of the trust funds subject to the settlement in favour of the husband did not take effect, he having predeceased the testatrix.

Solicitors: *Lewis & Payne; Solicitor to the Treasury.*

H. C. H.

MUNDY *v.* THE BUTTERLEY COMPANY, LIMITED.

MAUGHAM J.

1932

June 28.

[1932. M. 590.]

Practice—Discontinuance of Action by Plaintiff—Letter of Plaintiff's Solicitors asking for Affidavit of Documents not a "proceeding in the action"—Subsequent Notice of Discontinuance valid—R. S. C., Order XXVI., *r.* 1.

A formal notice to deliver an affidavit of documents given by a plaintiff's solicitors, after receipt of defence, is not "any other proceeding in the action" within the meaning of Order XXVI., r. 1, and a subsequent notice of discontinuance by the plaintiff is valid. It follows that special terms (e.g., as to prohibiting the plaintiff from bringing another action) cannot be imposed upon the plaintiff.

PROCEDURE SUMMONS.

The present application, which was by the defendants, asked: "That this action may stand dismissed for want of prosecution on the terms that the plaintiffs shall not be entitled to commence further proceedings against the defendants in respect of the subject-matter of this action. And that the costs of this action be paid by the plaintiffs to the said defendants as between solicitor and client on the footing of a complete indemnity." The writ in the action was issued on February 20, 1932, and it claimed against the defendants possession (inter alia) of a large number of veins of coal which the defendants had been working for a considerable time past and various accounts and payment of damages in respect of what was alleged to be wrongful working by the defendants. The statement of claim was delivered on April 5, 1932, and the defence was delivered by the defendants on April 26. On May 10, 1932, the solicitors for the plaintiffs wrote a letter to the defendants' solicitors in these terms: "Dear Sirs, Please accept this letter as formal notice to deliver affidavit of documents in accordance with the order made on the summons for directions." That order was in the usual terms, and provided that there should be delivered affidavits of documents after pleadings closed on notice by the respondents' solicitors that such an affidavit was required. On May 28, 1932, the solicitors for the plaintiffs forwarded to the solicitors for the defendants a

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notice of discontinuance in the ordinary form : " Take notice that the plaintiffs hereby wholly discontinue this action." The notice purported to be delivered under the terms of Order XXVI., r. 1. The defendants then issued this summons.

Gavin Simonds K.C. and *H. S. G. Buckmaster* for the applicants. The plaintiffs had put the defendants to a great amount of trouble and expense before they served the notice of discontinuance, and now they claim, in effect, to have the right at some future time to renew the same claim against the defendants and put them to the same trouble and expense over again. If they are compelled to proceed under Order XXVI., r. 1, terms ought to be imposed on them which would bar them from bringing the same claim again. The question really is whether the letter of May 10 demanding an affidavit of documents was " a proceeding in the action " within the meaning of Order XXVI., r. 1. The judgments of Lindley and Lopes L.JJ. in *Spincer* v. *Watts* (1) indicate strongly that they would have regarded it as such. Warrington J. in *Vickers, Sons & Maxim, Ld.* v. *Coventry Ordnance Works, Ld.* (2), quoted Lindley L.J. in *Spincer* v. *Watts*. (3) The letter of May 10 was a proceeding with a view of continuing the litigation.

The letter of May 28 was not a good notice of discontinuance, and, assuming it to be a nullity, the defendants are entitled to an order for the dismissal of the action for want of prosecution.

[They also cited *Fox* v. *Star Newspaper Co.* (4)]

Watmough for the plaintiffs. The letter of May 28 was a valid notice of discontinuance. There is no suggestion in any case that a notice given by one party is a " proceeding in the action." In *Monteiro* v. *Cotterell & Minter* (5) the notice of discontinuance was given by the plaintiff after the action

(1) (1889) 23 Q. B. D. 350, 352–3.
(2) [1908] W. N. 12.
(3) 23 Q. B. D. 350, 353.
(4) [1900] A. C. 19.
(5) [1924] W. N. 251.

had been set down for trial by the defendants: it has no bearing on the present case. In *Ives & Barker* v. *Willans* (1) it was held that a notice by a defendant requiring a statement of claim was not a "step in the proceedings" which debarred the defendant from applying for a stay under s. 4 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49). *Zalinoff* v. *Hammond* (2) is another case dealing with s. 4.

Gavin Simonds K.C. in reply: It is clear that Order XXVI., r. 1, means that if a plaintiff shows any intention of proceeding with the action and the defendant is put to any expense, the plaintiff cannot discontinue without the leave of the Court. To demand an inspection of documents or an affidavit of documents is a "proceeding in the action."

MAUGHAM J. Having regard to the terms of the application, it is plain that it is intended by this summons to raise, not the question whether the defendants have a bare right to have the action dismissed, but the question whether the defendants have a right to have the action dismissed on the terms that the plaintiffs shall not be entitled to commence further proceedings in respect of the subject-matter of the action. The notice of discontinuance by the plaintiffs purported to be delivered under the terms of Order XXVI., r. 1, and it is valid only if it had been delivered by the plaintiffs before taking any other proceedings in the action after the receipt of the defendants' defence, save any interlocutory application. A somewhat curious result arises in the case of a dispute as to whether a notice of discontinuance by the plaintiffs is valid or invalid. If it is invalid, it is a nullity, and the ordinary course of the defendants is to pay no attention to it and proceed to trial, and then at the trial presumably the plaintiff would be entitled to fight the action, because no proper notice of discontinuance had been given by him. That course has actually been taken in certain cases by the defendants. They set the action down for trial and proceeded to the trial, and then the Court has determined sometimes that the notice of discontinuance was valid,

(1) [1894] 2 Ch. 478. (2) [1898] 2 Ch. 92.

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sometimes that it was invalid. If it be held invalid and if the plaintiff does not support his case, the action is dismissed with costs; there is then a res judicata. On the other hand, the defendant having received a doubtful notice of discontinuance, I mean doubtful in relation to its validity, is entitled to pay no attention to it, to wait to see if the plaintiff proceeds to set the action down, and then if he does not, to take out a summons to dismiss for want of prosecution. On that no doubt an order will be made, but on the dismissal for the want of prosecution it is well settled there is no res judicata, and, accordingly, having paid the costs in the first action, the plaintiff can, with undiminished courage, begin again. I think it is not right for the Court to take the view that those are the only two courses possible. Each course may lead to great expense and delay, and I can see no objection to the defendant in such a case raising before the Court the real point which he wants decided at once—namely, the question whether the notice of discontinuance is good or bad. Such a course has the advantage that the plaintiff, as the result of the order made on the application, knows where he is; and the defendant knows where he is. The question being directly raised by this summons, I ought now to proceed to determine the purely technical point whether the plaintiffs have taken "any other proceeding in the action (save any interlocutory application)," after the receipt of the defence, so as to disentitle them by notice in writing wholly to discontinue the action on the terms mentioned in Order XXVI., r. 1? I think the point is one that is not free from difficulty.

The authorities which have been cited begin with *Spincer* v. *Watts* (1), where there is a judgment by Lindley L.J., which has often been referred to. Unfortunately, I think, the ground on which the Court of Appeal decided that case is one which is not open to me here. It was an action by the holder against the acceptor and the drawer of a bill of exchange. The acceptor paid money into Court in satisfaction of the claim, while the drawer delivered a defence denying liability, and set up a counterclaim. The plaintiff, after

(1) 23 Q. B. D. 350.

receipt of the defence, took the following step—a word I use without prejudice to what follows:—he paid into Court the amount of the counterclaim and took out of Court the amount paid in by the acceptor, and having done that, he gave the drawer notice of discontinuance. Then the question was whether that notice was good or bad, and that came before the Court on a direction to tax. In the Court of Appeal Lindley L.J., after referring to Order XXVI., r. 1, and the facts in the case, said this (1): "It is said that it was then too late for the plaintiff to give a notice of discontinuance, because he had, after receipt of the defence, taken a 'proceeding' in the action, not being an interlocutory application. I think that the exception throws some light upon the meaning of the words 'before taking any other proceeding in the action,' and, having regard to it and to the object of the rule, I think what is meant is, 'taking any proceeding with the view of continuing the litigation with the person against whom the proceeding is taken.' In the present case no proceeding was taken by the plaintiff with that view after the delivery of the defence. I think, therefore, that the plaintiff's technical objection fails, and it follows that he must pay the defendant Watts' costs of the action up to the date of the notice of discontinuance." Lopes L.J., who was putting exactly the same point, said this (2): "I do not think that either of those steps is the kind of 'proceeding' which was contemplated by r. 1 of Order XXVI. I think the rule intended a proceeding which is to have the effect of continuing the action—not a proceeding which has the effect of putting an end to the action. Therefore, I think the plaintiff was entitled to give the notice of discontinuance." That case does not seem to me to afford me very great assistance here, because the formal letter requiring a delivery of the defendants' affidavit of documents was not a letter intended to put an end to the proceeding in any way whatever; it was a letter written in the ordinary course by the plaintiffs' solicitors on the footing that the action was going to proceed and without evincing any

(1) 23 Q. B. D. 352, 353. (2) 23 Q. B. D. 353.

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intention whatever of shortening or putting an end to the proceedings or any part of them.

The next case cited is *Vickers, Sons & Maxim, Ld.* v. *Coventry Ordnance Works, Ld.* (1) There it is to be observed that after the notice of discontinuance, the defendants set the case down for trial, and when it came on for trial counsel for the plaintiffs submitted that the action had come to an end on the previous October 1, the date of the notice to discontinue, and that point the learned judge had, therefore, to determine. He in fact determined that the notice to discontinue was bad, and accordingly the action had to be dealt with and was dismissed with costs, the plaintiffs not supporting the action. This instance, therefore, is one of very inconvenient procedure being adopted for the purpose of getting the point determined whether a notice of discontinuance is or is not good. What was decided to be the objection to the notice of discontinuance was the fact that after the delivery by the defendants of their defence and particulars of objection, the plaintiffs amended their statement of claim by adding parties and amended the averment of title, and delivered their amended statement of claim on July 29, and then on October 1 they gave notice to discontinue. Warrington J. said: "That was not a mere formal proceeding on their part, but was done in order to enable them to prosecute successfully the action which without such amendment they could not have done." Then the report continues: "The delivery of that amended statement of claim was in his Lordship's judgment a proceeding other than an interlocutory application within Order XXVI., r. 1. The present case was not at all like *Spincer* v. *Watts* (2) as far as the facts were concerned, but the dicta of Lindley L.J. applied." As I have said, he accordingly dismissed the action with costs. So far, therefore, I have only reached this stage in attempting to construe Order XXVI., r. 1: that a step taken with a view to putting an end to the action is not a proceeding in the action, and that an amended pleading delivered after the delivery of the

(1) [1908] W. N. 12. (2) 23 Q. B. D. 350.

defendant's defence is prima facie another proceeding in the action and is clearly not an interlocutory application, which means an application to the Court. It seems to me then I have to decide, without very much assistance from those authorities, whether such a letter, which clearly is not an interlocutory application, is a proceeding in the action, the word "proceeding" being one which certainly does suggest something in the nature of a formal step, either an application to the Court which for the purposes of this rule would not be an interlocutory application, or at least a step taken by a litigant in prosecution of the action being a step which is required by the rules. In saying that, I am not attempting a complete definition but merely a kind of approximation to the sort of proceeding which is probably pointed to by the terms of the rule. I do not think on the whole that a letter written by a solicitor stating that he intends to set the action down for trial at a future date would be a proceeding in the action; I do not think a mere appointment to examine documents which had been offered for inspection would be a proceeding; I do not think that conferences between solicitors or either informal or quasi informal letters or conversations could be regarded as a proceeding. I should add that I am not even sure that a formal application under the summons for directions for delivery of an affidavit of documents or for leave to administer interrogatories would be regarded as "proceedings in the action other than of an interlocutory nature," and, without deciding that, I may add it would be very strange if a mere letter saying the previous order must be complied with is a proceeding within the meaning of this rule, although an application for the order, or for similar relief, would not bar the right of the plaintiff to discontinue the action because of the exception in the rule "save any interlocutory application."

In coming to the conclusion at which I have arrived, I think it is right to say I have derived some assistance from the decision of the Court of Appeal in a somewhat similar matter in *Ives & Barker* v. *Willans*. (1) That was a decision

(1) [1894] 2 Ch. 478.

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not upon Order XXVI., r. 1, but upon s. 4 of the Arbitration Act, 1889, a section which enables a defendant to apply for a stay of proceedings where there is a submission to arbitration if he has not taken a step in the action. The words used in the section are: "before delivering any pleadings or taking any other steps in the proceedings." A proceeding must proceed by steps, and I do not think that it is possible to take a step in the proceedings unless, comparing the words with the words used in Order XXVI., r. 1, you are taking a proceeding in the action. What had been done by the defendants in *Ives & Barker* v. *Willans* (1) was this: the defendant had appeared in the action and had given to the plaintiffs notice in writing requiring a statement of claim to be delivered in an action for a declaration and for damages, and it was in those circumstances that the defendant took out a summons for a stay pursuant to s. 4 of the Arbitration Act, 1889. Lindley L.J., after stating the facts, says this (2): "Now the language of the section requires a little attention. It is quite obvious that the step to be taken must be a step to be taken by the applicant. It is not before any pleadings are delivered by anybody or any step is taken by anybody, but it is before the party applying delivers any pleadings or takes any other steps; and, therefore, the question we have to consider is narrowed down to this: whether a request by one party to another to take a step is taking a step himself. That is what the defendant did. He asked the plaintiffs to take a step, to deliver a statement of claim. I cannot say that is taking a step in the proceedings which precludes the defendant making the application, and I do not think it would be good sense if we held that it was." Now it is true that after that the learned judge proceeded to consider the whole position with regard to the true construction of s. 4 of the Arbitration Act, and that he showed grounds for saying that the view he had formed seemed to him to be one which was consistent with the real substance and the good sense of the matter; but apart from that I

(1) [1894] 2 Ch. 478. (2) [1894] 2 Ch. 483.

think it is clear that on the meaning of the words "a step in the proceedings," he was of opinion that it was not a step in the proceedings to request another party to the proceedings himself to take a step. Then he adds this observation (1): "The authorities shew that a step in the proceedings means something in the nature of an application to the Court, and not mere talk between solicitors or solicitors' clerks, nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is, in the technical sense, a step in the proceedings." A somewhat similar decision was given by Stirling J. in *Zalinoff* v. *Hammond*. (2)

On these grounds I have come to the conclusion that I must hold that the letter requiring delivery of the defendants' affidavit of documents pursuant to an order on the summons for directions was not another proceeding in the action within the meaning of Order XXVI., r. 1, and, accordingly, the notice of discontinuance, in my opinion, must be taken to be a valid notice. The present application then, I think, must fail, and the costs of the present application should be set off against costs which are payable by the plaintiffs.

Solicitors for the applicants: *Thicknesse & Hull.*

Solicitors for the plaintiffs: *Ellis & Ellis and Kirby, Millett & Ayscough.*

(1) [1894] 2 Ch. 484.

(2) [1898] 2 Ch. 92.

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July 6, 7.

In re WITHALL.

WITHALL *v.* COBB.

[1931. W. 493.]

Will—Charitable Bequest—Legacy to Hospital—Change of Site and Name in Testatrix's Lifetime—Continuation and Expansion of Hospital Work —No Lapse.

A testatrix by her will dated September 22, 1924, directed her executors to sell the residue of her property and to pay the proceeds to the Margate Cottage Hospital.

At the time she made her will there was a hospital of that name—an unincorporated body—to the funds of which the testatrix was a subscriber. About the year 1926, a fund was opened for the purpose of purchasing a new site and building a larger hospital, to which the testatrix was also a contributor. At the time of the testatrix's death on October 19, 1930, the work formerly carried on at the Margate Cottage Hospital, including the medical and nursing staff and the patients, had been transferred to and was carried on at the new hospital, called the "Margate and District General Hospital," which had been opened on July 3, 1930. The invested funds held by trustees for the Margate Cottage Hospital and the income thereof were dealt with by the same trustees for the purposes of the new hospital:—

Held, that the real intention of the testatrix was to add the proceeds of sale of her residuary estate to the funds dedicated to the purposes of the Margate Cottage Hospital, and that, accordingly, there was a valid charitable bequest of those moneys to which the next of kin of the testatrix had no title.

Whether the Margate and District General Hospital was in any and what sense identical with the Margate Cottage Hospital, and whether the purposes of the Margate and District General Hospital to which those who administered the funds of the Margate Cottage Hospital had devoted them were in a true sense the purposes of the Margate Cottage Hospital, *quaere*.

ADJOURNED SUMMONS.

Alice Withall, who died on October 19, 1930, by her will dated September 22, 1924, directed her executors to sell the residue of her property and to pay the proceeds to the Margate Cottage Hospital.

At the time she made her will there was a hospital of that name, an unincorporated body, carrying on hospital work in the usual way.

About the time when that hospital celebrated its jubilee in 1926, a special committee of the hospital was formed for the purpose of collecting funds to purchase a site and to build a larger hospital thereon: and, accordingly, a fund was raised by voluntary subscription with those objects. A new site was purchased, and in August, 1928, conveyed to the trustees of the Margate Cottage Hospital. The contract for the new buildings was signed by the committee who administered the trusts of that hospital, the members of which made themselves responsible thereon. The foundation stone of the new building was laid in September, 1928, and on July 3, 1930, the new hospital called the "Margate and District General Hospital" was opened: and to it was transferred the work of the Margate Cottage Hospital, including the medical and nursing staff and the patients. The accounts of the Margate Cottage Hospital were closed as at July 31, 1930, and the accounts of the new hospital were opened as from a date shortly before that, and as from some date in 1930 all the investments held by trustees for the Margate Cottage Hospital of the value of about 28,000*l.* and the income thereof were thenceforth treated by the same trustees as applicable for the purposes of the new hospital.

The testatrix had been an annual subscriber to the Margate Cottage Hospital for several years, including the year 1930, and had contributed to the fund for the new buildings.

The new hospital was opened for the reception of patients coming from a district more extensive than that of the borough of Margate served by the Margate Cottage Hospital, and, further, was not a free hospital, as the Margate Cottage Hospital had been.

The originating summons raised the question, first, whether, upon the true construction of the will, the gift in the will was a valid charitable bequest, or whether the statutory next of kin of the testatrix were entitled to the residue as upon an intestacy; and secondly, whether, in the events which happened, the gift, if valid, lapsed in favour of the statutory next of kin of the testatrix or took effect for the benefit of the Margate and District General Hospital.

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WITHALL, *In re.*

WITHALL v. COBB.

It appeared at the hearing that a scheme had been settled by the Charity Commissioners, though not yet made binding, for the administration of the funds of the Margate Cottage Hospital.

R. J. White for the plaintiffs, the trustees of the will.

Wilfrid Hunt for the Margate Cottage Hospital and the Margate and District General Hospital. The Margate Cottage Hospital is still in existence under another name ; the change of site and of name were not enough to put an end to its existence. The purposes of that hospital have not failed, for its work is still carried on in the new building without any break in the continuity of the Margate Cottage Hospital. It was not so much a particular institution that the testatrix had in mind and wished to benefit as the charitable work carried on there and which has been transferred to and carried on in the new building. In the case of *In re Rymer* (1) the particular work had ceased to be carried on and the seminary had closed its doors. As was said by Farwell L.J. in *In re Faraker* (2) : " So long as that charitable end is well established the means are only machinery, and no alteration of the machinery can destroy the charitable trust for the benefit of which the machinery is provided." What the testatrix intended was to add some of her property to the funds of the Margate Cottage Hospital, with which she was well acquainted. Her bequest cannot be affected by the fact that the work of the hospital has been enlarged or even though its funds had been transferred to some other institution : see Farwell L.J.'s judgment in *In re Faraker*. (2) This view seems to be borne out by the following cases : *In re Joy* (3), where a legacy was given to each of two unincorporated societies having substantially the same objects which, before the testatrix's death, had become amalgamated, and it was held that each society continued its existence, although they bore the name of one only, and that the amalgamated societies were entitled to both legacies; *In re*

(1) [1895] 1 Ch. 19. (2) [1912] 2 Ch. 488, 495.
(3) (1888) 60 L. T. 175.

Wedgwood (1), where the gift was dedicated to the work carried on at St. Mary's Home at Chelsea. The work of that Home was soon after the date of the will transferred to another association without any break in the constitution of the Home or the work carried on there: and it was held that there was a valid charitable gift for the purposes of the work carried on at St. Mary's Home.

Stafford Crossman for the Attorney-General, supported the arguments put forward on behalf of the hospitals and referred to an unreported case of *In re Watt.* (2)

W. D. Roberts for the next of kin. The bequest lapsed through the extinction of the Margate Cottage Hospital before the death of the testatrix. The bequest is made not to a trust or a fund, but to a particular institution known to the testatrix—namely, the Margate Cottage Hospital. Her gift was dedicated to that particular institution for the work which was being carried on there, that is at the Margate Cottage Hospital: *In re Rymer* (3); *Clark* v. *Taylor.* (4) The Margate and District General Hospital is a different institution and its objects are not the same as the objects of the Margate Cottage Hospital. That hospital was a free hospital, whereas the Margate and District General Hospital makes a charge for patients and serves a wider district than the old hospital.

CLAUSON J. Miss Alice Withall made her will on September 22, 1924, and after some trifling bequests made the following disposition: "and as for the residue of my property of whatever description I direct my executors to sell the same and pay the proceeds to the Margate Cottage Hospital." In the year 1924, when the lady made her will, there was an institution known as the "Margate Cottage Hospital," possessed of certain funds. Somewhere about the year 1928 it was considered desirable to make changes in the work of the Cottage Hospital. After some little time what in fact occurred was this: [His Lordship then stated

(1) [1914] 2 Ch. 245.
(2) See note at the end of this report, p. 243.
(3) [1895] 1 Ch. 19.
(4) (1853) 1 Drew. 642.

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the facts and continued :] The testatrix died on October 19, 1930, when hospital work had in fact ceased at the building previously known as the Cottage Hospital, and the former committee of the Cottage Hospital, as a temporary committee for the new hospital, apparently, were carrying on the new hospital in the way I have described. Accordingly, it may be doubted whether at the moment the testatrix died on October 19, 1930, it would be true in every sense to say that the Cottage Hospital was still existing. Now it is familiar law that if a testator leaves property to A. B., and A. B. predeceases the testator, the gift to A. B. lapses : A. B. is not there to take it. The next of kin of the testatrix, who would have taken under an intestacy, urged before this Court that on October 19, 1930, when the testatrix died, it was true to say (using, of course, a metaphor) that the residuary legatee, the Margate Cottage Hospital, had died, had ceased to exist; that there was a lapse, in that the Margate Cottage Hospital was not there to take the funds which the testatrix had bequeathed to it.

I have before me on the face of the summons as defendants, what is called the Margate and District General Hospital. They put forward a claim to the legacy, saying, in effect, this : True it is the name is changed, and the actual bricks and mortar within which we carry on the hospital work are not the same as the actual bricks and mortar within which the work of the hospital was being carried on when the testatrix made her will ; but this is only a change of name and a change of locality, and although the present hospital is larger than it was in 1924, this is the same institution, and we are entitled to have the funds handed over to us. On the other hand, the next of kin say : The old hospital came to an end and a new hospital was deliberately formed and is a new institution. Further they say : The new institution differs, and in a crucial sense from the old one, in that, whereas the old institution was a free hospital, the new institution is not in the same sense a free hospital, and accordingly the next of kin point to that circumstance as showing that the claimants who claim the residue on behalf

of the Margate and District General Hospital, are claiming on behalf of a stranger to the legacy.

The question which I have to determine is what is the true meaning of the gift contained in the expression: "I direct my executors to sell the residue of my property and to pay the proceeds to the Margate Cottage Hospital"? In my view the testatrix is intending that her residue should be added to the funds dedicated to the purposes of the Margate Cottage Hospital, the institution which she knew. Now if the work of an institution such as the Margate Cottage Hospital is being carried on by those who are voluntarily administering its affairs, without funds, from day to day on such bounty as it can obtain, when those administrators cease for lack of means to carry on the work, the work ceases, there are no longer any persons associated for the purposes of the work, and there are no funds dedicated to the work which was theretofore carried on: in such circumstances in a full and true sense that institution in my view has ceased to exist. That was the position which the Court had to deal with in the case of *In re Rymer* (1) and *Clark* v. *Taylor*. (2) But that is not the position in the present case. In the present case there were funds dedicated for the purposes of the Margate Cottage Hospital. Those funds shortly before the testatrix's death were dealt with by those under whose control they were, as if it was justifiable within the terms of the trust which bound those funds to use them for the purposes of the Margate and District General Hospital. They may have been right or they may have been wrong; if they were right, it means that the Margate General Hospital is a mere expansion of the Cottage Hospital and is in every sense in which I am concerned with the matter the same institution; but suppose they were wrong, and suppose that what they were doing was to hand over funds dedicated to the Margate Cottage Hospital to a new and different body, what is the result?—not, in my view, that the trusts affecting those funds, by reason of which they are dedicated for the purposes, whatever

(1) [1895] 1 Ch. 19. (2) 1 Drew. 642.

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be the exact purposes, of the Margate Cottage Hospital, have come to an end. Those trusts still exist. If the trustees are not carrying them out, the Attorney-General by proper proceedings can force them to take such steps or concur in such steps as may be necessary to enable the trusts to be carried out. The institution itself may be, for the moment, in abeyance and not in fact being carried on, but the institution exists in the sense that there are in existence funds dedicated to particular trusts which ought to be carried out, and the performance of which the Court can and will enforce.

Those being the facts of the case, let me turn again to the will. What is the operation of the will? The proceeds are to be paid to the Margate Cottage Hospital. That does not mean, as has been picturesquely said, the bricks and mortar; that means that they are to be paid to the persons administering the trusts to which the funds of the Margate Cottage Hospital are dedicated, as an accretion to those funds, to be used for those purposes. There is nothing invalid in that, and, accordingly, the next of kin are effectually excluded. True it is that in the circumstances the representatives of the Margate and District General Hospital may possibly not be the right people to whom the money should be paid. It may be that the purposes which are being carried on by the authorities in control of the Margate and District General Hospital are not in the true sense the purposes of the Margate Cottage Hospital. It may or may not be that in the altered circumstances the right way of administering the trusts which affect the funds of the Margate Cottage Hospital is to use the funds for the purposes of the Margate and District General Hospital; but with that I do not propose to deal. My decision is that the next of kin have no interest in the matter, and that the testatrix's residue is to be applied for the purposes of the Margate Cottage Hospital; but for the moment I do not see why I should determine what seems to me to be the purely academic question as to the sense (if any) in which the Margate and District General Hospital can be said to retain the identity of the Margate

Cottage Hospital. I understand that there is a scheme in existence which has been settled and approved by the Charity Commissioners, though not finally made binding, which will in due course govern the application of the funds of the Margate Cottage Hospital. There will be a declaration that the gift of the proceeds of sale of the testatrix's residue is a good charitable gift and that the next of kin are not entitled. And I will direct the trustees to pay the residue to the persons who, under the scheme sealed by the Charity Commissioners, relating to the charity known as the Margate Cottage Hospital, are declared to be the proper persons to receive the funds of the said charity. I will reserve liberty to apply. The costs of all parties as between solicitor and client will be paid out of the estate.

Solicitors: *Rivers & Milne; Kingsford, Dorman & Co., for Boys & Maughan, Margate; Solicitor to the Treasury.*

H. C. H.

NOTE.

April 16, 1931.

In re WATT.

HICKS *v.* HILL.

[1930. W. 2178.]

Appeal from a decision of Clauson J.

The Reverend George D. D. Watt by his will dated December 12, 1925, directed that the trustees thereof should stand possessed of his residuary estate in trust to pay and divide the same unto and equally amongst the following charities. The testator then named six institutions, of which one was the "Southwark Diocesan Society."

The testator died on December 21, 1929.

There was no society known as the "Southwark Diocesan Society," but there was a society called the "Southwark Diocesan and South London Church Fund," and there was evidence that that society often adopted the short title of "Southwark Diocesan Fund" when giving receipts for subscriptions.

Before the year 1904, there existed a society called the "Rochester Diocesan Society," which had for its object the promotion of Church work in South London and other parts of the diocese and to which society the testator had been a subscriber. In that year the diocese of Rochester was divided into the diocese of Rochester and the diocese of Southwark; and then it was that the Rochester Diocesan Society changed its name to the "Southwark Diocesan and South London Church Fund."

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It appeared that in the years 1905, 1906 and 1907 the testator was a subscriber to that society.

On January 22, 1929, a society called the "South London Church Fund and Southwark Diocesan Board of Finance" was incorporated for the purpose of taking over the assets of the "Southwark Diocesan and South London Church Fund" upon the existing trusts and for continuing the work of the last named society. When the Southwark Diocesan and South London Church Fund transferred the fund to the appellants, the agreement made upon that occasion contained a provision that the former society should cease to function; but that the appellants should represent it for the purpose of the receipt of legacies and benefactions.

Questions were raised by originating summons as to the validity of the gifts of one-sixth of the testator's residuary estate to each of the six charitable institutions named in his will; and as to the gift of one-sixth to the "Southwark Diocesan Society," to which the "South London Church Fund and Southwark Diocesan Board of Finance" claimed to be entitled, Clauson J., on January 14, 1931, held that, as the testator intended the gift to be for the "Southwark Diocesan and South London Church Fund" and as at the time of his death that society had no separate existence, there was a lapse of the one-sixth so bequeathed in trust for that society and that the same was undisposed of.

From that judgment the "South London Church Fund and Southwark Diocesan Board of Finance" appealed. The appeal was heard on April 16, 1931.

Vaisey K.C. and *F. H. L. Errington* for the appellants. It was the work carried on by the Southwark Diocesan and South London Church Fund which the testator intended to benefit. The work of that society was taken over and carried on by the appellants in his lifetime. The fact that that work was carried on by a body bearing a different name or even by a different body would not be sufficient to cause a lapse: *In re Faraker* (1); *In re Joy* (2); *In re Pritt* (3); *In re Wilson's Will* (4); *In re Adams.* (5)

C. Lyttelton Chubb for the trustees.

W. G. Hart for one of the testator's next of kin who was appointed by the Court of Appeal to represent the next of kin. The appellants, an incorporated company, were a new institution with a different name from the "Southwark Diocesan and South London Church Fund." Its objects were much wider than those of the other society. This new incorporated body took control of all the previously existing societies of the diocese and proceeded to administer their funds in place of the trustees of those societies. The appellant Board was constituted a Diocesan Board of Finance under the compulsory Measure known as the Diocesan Boards of Finance Measure, 1925 (15 & 16 Geo. 5), No. 3. "The Southwark Diocesan and South London Church Fund" was only one of the several existing diocesan bodies of the diocese which were taken over under the Measure. Those bodies were trustees of the moneys subscribed for their respective objects; and, when they transferred their funds to the Diocesan Board of Finance, those bodies ceased to be trustees and were discharged from the trust, and the Board became the trustees of the funds in their place. The appellants are not the successors

(1) [1912] 2 Ch. 488.
(2) (1888) 60 L. T. 175.
(3) (1915) 113 L. T. 136.
(4) (1854) 19 Beav. 594.
(5) (1888) 4 Times L. R. 757.

of the society which the testator intended to benefit, but are a different body altogether and there is a lapse of the one-sixth share bequeathed to it: *In re Rymer.* (6) A testator may, no doubt, make a bequest to a charity without naming any persons who are to receive the money; but, in order that the bequest may not fail, there must be persons in existence who administer the funds of the charity. The Southwark Diocesan and South London Church Fund, which is the society the testator intended by his will, had ceased to function at the date of his death. By the agreement that society made with the appellants, they put an end to themselves. That agreement was ineffectual to preserve the identity or continue the functions and duties of the "Southwark Diocesan and South London Church Fund." The body which claims the legacy—namely, the appellants, is not the body which the testator intended by the words "Southwark Diocesan Society." A legatee is incapable of providing against lapse by agreeing with another that that other shall stand in his place and take the legacy which the legatee is incapable of taking. Here, as in *In re Rymer* (1), the persons who in their character of trustees of the funds belonging to the Southwark Diocesan and South London Church Fund had ceased to exist, had ceased to be clothed with the necessary legal status to enable them to take the legacy.

[ROMER L.J. But the trusts in *In re Rymer* (1) could not be carried out; the trusts there were to do certain things at a certain place—namely, Hammersmith, and the seminary had been moved thence to Birmingham.]

LORD HANWORTH M.R. This is quite a short point. What has to be determined is whether or not the bequest of one-sixth of the residuary estate to (inter alios) the "Southwark Diocesan Society" fails by reason of the fact that that society was not and is not at the present time in being, at any rate under that name.

It is unnecessary to travel through the facts or to deal with all the points which obviously leap to the mind when one has to consider a matter of this sort. It is quite right, as the learned judge has said, that in some cases you may find and must hold that, where a legacy has been given to A., it cannot be claimed by B.: and Mr. Hart is quite right in referring to *In re Rymer* (1) as a case where there was a failure of the particular object and the bequest failed. But, although there may be cases where the funds or objects of a body have been taken over and in that sense had come to an end, it has always to be determined whether that is the true effect of the facts or whether or not it is a case, and there have been such cases, where there has been an amalgamation and where the amalgamated body preserves the duties and rights of both; and then each society may continue to exist for the purpose of a bequest. Again, there may be a case in which the gift is not to a particular person or association, but for the purpose of carrying on a particular charitable work; and then it will not fail by reason of a change in the management or in the address of the charity. In the case of *In re Joy* (2) Chitty J. said: "So far as the legacies are concerned, the two societies continue to exist, although they now bear the name of one and one only." And "in cases of this kind, some slight alterations made in the constitution of the society as it existed at the date of the will do not avoid the legacy,

(1) [1895] 1 Ch. 19. (2) 60 L. T. 175, 176.

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and have not the effect of justifying the Court in saying that, because there has been some alteration, the identity is lost."

In this case we have the words of the testator, "The Southwark Diocesan Society," and he did live in South London. If he had used the words "The Southwark Diocesan and South London Church Fund," apparently he would have been right. But it is said that, in consequence of the incorporation of the South London Church Fund and Southwark Diocesan Board of Finance and the agreement which was entered into, to which Mr. Hart rightly called attention, the identity of the object of the bequest has been lost. Clauson J. has taken the view that the Southwark Diocesan Society is one thing, and that what now exists is something different in identity, so as to introduce the rule to which I have referred, that a legacy to A. does not mean a legacy to B. But charity is always favoured by equity and we think that, in what is a matter of some difficulty, the testator has substantially designated under the words he has used the body that still carries on the work in which he was interested years ago, work carried on in a district in which he lived and which is now in charge of and being administered by this more modern body.

In these circumstances the appeal will be allowed and the question answered favourably on the originating summons.

LAWRENCE L.J. In the special circumstances of this case, I think it is one which falls under that class of cases where there is a gift, not to a particular person or association, but for the purpose of carrying on a particular charitable work. Here it is abundantly plain on the special facts that that work for the benefit of which the bequest was made is still being carried on, and the mere fact that it has been carried on by different persons or a different body is not sufficient to cause a lapse of the legacy.

ROMER L.J. On the facts of this case, which are peculiar and not likely to exist again, I think we are bound to arrive at the conclusion that the testator was intending to benefit not any particular society or body of persons, but a purpose, a charitable purpose which some vague society appears to have been carrying on. While the constitution of the society was vague, there seems to be no vagueness as to the nature of the work. For these reasons I agree that the appeal must be allowed.

Solicitors: *Day & Son; Vyvyan G. H. Hicks.*

H. C. H.

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